TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 275 13

STEPHEN R. WAINWRIGHT, PETITIONER,

vs.

CITY OF NEW ORLEANS, LOUISIANA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI FILED JUNE 21, 1966

CERTIORARI GRANTED JANUARY 9, 1967

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

B-80503

CITY OF NEW ORLEANS, STATE OF LOUISIANA,

vs. Number #189-939 "E"

STEPHEN R. WAINWRIGHT.

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE SECOND MUNICIPAL COURT, CITY OF NEW ORLEANS, STATE OF LOUISIANA—Filed May 11, 1965

Dan A. Spencer, 3420 Greenwood Road, Shreveport, Louisiana, Attorney for Stephen R. Wainwright.

5-13-65

Writs Refused
S. Marchese, Minute Clerk.

[fol. 2] To the Honorable the Judges of the Criminal District Court of the Parish of Orleans, State of Louisiana:

The petition of Stephen Reed Wainwright, defendant in a case entitled "City of New Orleans vs. Stephen Reed Wainwright, No. B-80503 on the Docket of the Second Municipal Court of the City of New Orleans, respectfully shows:

Statement of the Case

The defendant is charged in three affidavits with violations of municipal ordinances of the City of New Orleans,

[File endorsement omitted]

being ordinances Nos. 828 MCS, Sections 49-2, relative to resisting arrest, 42-85 :3, relative to loitering and 49-7, relative to reviling the police. It is alleged in the affidavits that the defendant violated the said ordinances on Tuesday, the 13th day of October, 1964.

On December 4, 1964, the trial of this case was begun and two witnesses were heard. The witnesses testified to the character of the defendant and the fact that he was and had been on the date of the alleged offense a student in the School of Law at Tulane University. Following the testimony of the two character witnesses, the court ordered the trial of this matter continued indefinitely, over the strenuous objection of counsel for defendant. Sometime in the month of April, 1965, subpoenas were issued to the defendant and his attorney ordering the continuance of the trial herein. The trial was set to resume on the 7th day of May, 1965.

At the commencement of the trial a number of witnesses for whom subpoenas had been requested by the defendant were not present in open court. The court refused to issue attachments for these witnesses although it did see fit to sequester the dean at the Tulane University School of Law, a prospective character witness for the defendant, putting him in a private office, by himself. Following the swearing of one of the city's witnesses, and some testimony by him, the case was thereupon continued to the 14th day of [fol. 3] May, 1965, once more over the strenuous objections of counsel for defendant.

During the course of the testimony at the trial on the 7th day of May, 1965, the defendant was forced to stand at attention before the dock and threatened by Judge Andrew Bucaro, the Judge of the said court, with being placed in jail for contempt if he moved.

In continuing the case to the 14th day of May the Judge stated that he was doing so in retaliation for the defendant's having turned around while standing before the dock. He further stated that the fact that counsel for de-

fendant was from Shreveport and would be forced to return again to the City of New Orleans to resume the trial made no difference, as he (the Judge) "understood that the defendant's father was a successful attorney and could afford counsel's fee". He further stated that the fact that the defendant would be in the midst of taking final exams in the Tulane Law School at the time of the trial would make no difference. The case was continued.

Ground on Which the Supervisory Jurisdiction of This Court Is Invoked

Petitioner shows that no appeal lies from the judgments and actions complained of and further shows that he will suffer irrevocable injury as a result of these judgments and actions unless remedial writs are granted by this Honorable Court for the following reasons:

The Issues

This case is a prosecution by the City of New Orleans for the violation of municipal ordinances. The issues and questions of law involved are:

1. Whether the continuance of this case from time to time over a period of five months for the obvious reason of imposing summary punishment on the defendant constitutes a violation of the defendant's constitutional rights to a fair and impartial and speedy trial and due process of law.

[fol. 4] 2. Whether the forcing of the defendant, who is partially incapacitated by duodenal ulcers and a back injury, to stand at attention before the dock of the court in such a manner as to impose summary punishment constitutes a violation of his constitutional immunity from cruel and unusual punishment and his right to due process of law and to be presumed innocent until proven guilty.

3. Whether a trial Judge may intimidate a defendant and his counsel with threats to hold the defendant in con-

tempt of court for actions which would not, in the eyes of reasonable men, infer any lack of respect for the court.

4. Whether the defendant may be constitutionally deprived of his right to compulsory process for the attendance of witnesses in his favor.

Assignment of Errors

1. The court erred in continuing the trial for a period of over five months.

2. The court erred in continuing the trial on May 7, 1965, as a means of retaliation against the imagined lack of respect of the defendant for the court.

3. The court erred in continuing the trial on May 7, 1965, as a means of imposing summary punishment on the defendant without due process of law.

4. The court erred in failing to issue instanter subpoenas or attachments for absent witnesses subpoenaed by the defendant.

5. The court erred in forcing the defendant, who is not in good health, to stand at attention before the dock of the court, this being a mediaeval practice long since discarded by the courts of this country.

6. The court erred in attempting to intimidate defendant and his counsel with threats of jailing defendant for contempt.

[fol. 5] Argument on Assignment of Errors

This proceeding in the municipal court in the City of New Orleans constitutes a flagrant and shameful travesty of justice. From the time of defendant's arrest in this case, his rights have been totally ignored. After being brutally and unjustifiably beaten by the New Orleans Police Department, defendant was denied the right to confer with his counsel or obtain medical assistance for a period

of several hours. When his attorney attempted to see him shortly after his arrest, the attorney was ordered from the police station, arrested for refusing to leave it without seeing his client, and jailed.

On the evening on which defendant was arraigned in the municipal court, undersigned counsel, the same attorney who was arrested by the police on the previous night, was informed by one Judge of the Municipal Court that in any case before that court in which the complainant was a policeman, there would be a conviction whether the defendant be an attorney, a priest or of impeccable character and despite any testimony of the defendant's innocence. The Judge gave as a reason that he and the other Judges of the Municipal Court could not be reelected without the support of the New Orleans Police Department and that, consequently, the Judges of that court must, of necessity, support the policemen, whether they were right or wrong. When defendant's attorney went to trial on the charges against him in the Municipal Court, he was asked to attend the chambers of the presiding Judge. He was there given cause to believe that unless he dropped any action he might be contemplating against the policemen involved, he would be convicted. When he refused to drop the action against the policemen, he was convicted on a record devoid of any evidence of guilt. Attempts were made by the Judge and the City Attorney to prevent him from taking an appeal. Immediately prior to the commencement of that trial, the presiding Judge had been visited in his office by the Superintendent of Police, who was a witness in the case, and both the defendant and his associate counsel were denied the right to be present at the conference.

[fol. 6] An appeal was ultimately perfected to this Honorable Court, being Case No. 188-368 of Section E of this Court. The Honorable Rudolph F. Becker, Jr. acquitted undersigned counsel of any wrongdoing in that case.

Counsel has been informed by the City Attorney's office that in any case before the Municipal Court, it is the duty

of the City Attorney, as much to protect policemen from possible civil actions as it is to obtain convictions of guilty persons.

The foregoing recitation has been provided to give the court the background on this case and the environment in which it has been conducted. This can hardly be said to have been a fair and impartial trial to date.

The errors of the trial Judge set out above constitute, in the opinion of counsel, an attempt to summarily punish the defendant for charges he has made against members of the New Orleans Police Department. The expenses of defense in this case, exclusive of attorney's fees, will nearly exceed the maximum fine which could be imposed upon the defendant should he be found guilty. It would seem that justice in the City of New Orleans places a much higher cost on proving one's innocence than in pleading guilty to totally unfounded and unwarranted charges, at least in the Municipal Court.

Unless this Honorable Court grants the writs here applied for, the defendant will be further unjustly damaged in the Municipal Court. He will be forced to stand at attention, possibly for hours, before the dock of the court. He will be forced, while in the midst of his final exams in his last semester of law school to come again and again to the municipal court, there to be unfairly abused with threats of jail for any slight movement. His attorney will be forced, one knows not how many more times, to journey from Shreveport to New Orleans to hear perhaps half the testimony of one witness, if that, on each trip. The defendant could hardly obtain new counsel in the middle of the trial. Defendant will be deprived of his right to obtain witnesses in his favor by the refusal of the trial court to issue subpoenas.

[fol. 7] Wherefore, petitioner prays that his application for remedial writs be filed in this Honorable Court and that writs of Certiorari, Prohibition and Mandamus issue herein ordering and commanding the Judge of the Second

Municipal Court of the City of New Orleans to send forthwith the original records of the above case to this court for reviewing of the judgments and actions of the said Judge of the Second Municipal Court and prohibit the said Judge from proceeding further in this case and the respondent from prosecuting it further until the judgment be pronounced herein on the regularity of these proceedings. That the aforesaid Judge of the Second Municipal Court and the respondent, the City Attorney, be ordered to show cause in this court at a day and hour to be fixed by the court, why the Honorable Andrew Bucaro, Judge of the Second Municipal Court, should not be ordered:

1. To commence immediately and with twenty-four (24) hours the trial of this case and the taking of evidence therein and to proceed from minute to minute and hour to hour until such time as all of the evidence has been heard and judgment rendered.

2. To cease and desist from having the defendant stand at attention at the dock of the court and to allow him to be seated during the course of the trial.

3. To cease and desist from threatening either defendant, or his counsel, with holding them in contempt unless it should be necessary to do so to maintain order in the court room.

4. To issue instanter subpoenas or attachments for any witnesses for whom subpoenas were requested by defendant or his counsel and who were not present in court at the commencement of the trial.

Dan A. Spencer, Attorney for Petitioner, 34 Greenwood Road, Shreveport, Louisiana.

[fol. 8]

CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

SECTION .....

NUMBER .....

CITY OF NEW ORLEANS,

VS.

STEPHEN R. WAINWRIGHT.

In re: Stephen R. Wainwright, applying for writs of Certiorari, Prohibition and Mandamus:

The petition of the relator in the above entitled and numbered cause, having been duly considered;

It is ordered that a writ of Certiorari issue herein, directing the Honorable Andrew Bucaro, Judge of the Second Municipal Court of the City of New Orleans to transmit to the Criminal District Court for the Parish of Orleans on or before the _____ day of _____, 1965, the record, or a certified copy of the record, of the proceedings complained of by the relator herein, to the end that the validity of said proceedings may be ascertained.

It is further ordered that the aforesaid Judge of said court and the respondent, City Attorney of the Municipal Court, show cause, in this court, on the date aforesaid at _____ o'clock _____.M., why the relief prayed for in the petition of the relator should not be granted.

It is further ordered that the aforesaid Judge be and he is hereby enjoined by proceeding further in this case

until judgment shall be pronounced on the regularity of his proceeding.

Granted at New Orleans, Louisiana, _____, 1965.

_____, Judge

[fol. 9] State of Louisiana,
Parish of Caddo:

Dan A. Spencer, being duly sworn, deposed and said that he is Attorney for the petitioner in the above and foregoing application for remedial Writs of Certiorari, Prohibition and Mandamus; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to the City Attorney, postage prepaid and a copy has been mailed to the respondent Judge of the Second Municipal Court, Honorable Andrew Becker, postage prepaid.

Dan A. Spencer.

Sworn to and Subscribed before me, this 10th day of May, 1965.

E. E. Bland, Jr., Notary Public, Caddo Parish, La. My Commission Is for Life.

Let this application be filed and let an allotment of same be made May 17, 1965.

George P. Platt, Judge.

[fol. 10]

IN THE CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 189-939

SECTION "E"

CITY OF NEW ORLEANS, STATE OF LOUISIANA,

VS.

STEPHEN R. WAINWRIGHT.

WRITS REFUSED—May 13, 1965

Application for Writs of Certiorari, Prohibition and Mandamus to the Second Municipal Court, City of New Orleans, State of Louisiana.

New Orleans, Louisiana, this 13th day of May, 1965.

Rudolph F. Becker, Jr., Judge, Section "E", Criminal District Court, Parish of Orleans.

[fol. 11]

IN THE FIRST MUNICIPAL COURT

No. 83469-A

CITY OF NEW ORLEANS,

VERSUS

STEPHEN R. WAINWRIGHT.

CHARGES

Violation of Ordinance No. 828 M.C.S., Section 49-2, Relative to Resisting an Officer, Section 42-24, Relative to Disturbing the Peace by Assault on Patn. George O'Rourke, and Section 42-24, Disturbing the Peace by Assault on Patn. Frank Gilford.

TRANSCRIPT OF TESTIMONY AND NOTES OF EVIDENCE
JULY 16, 1965

Before the Honorable Andrew G. Bucaro, Judge.

On Behalf of the City and the Accused:

Present in Court: (10:45 o'clock A.M.)

1. Mr. Stephen R. Wainwright, Defendant, 36 South Street, Brocton, Massachusetts, represented by Mr. Dan A. Spencer, Attorney at Law, 3420 Greenwood Drive, Shreveport, Louisiana.

The following witnesses for the City of New Orleans:

2. Lt. F. Martello,
3. Patn. E. Boepple,
4. Patn. J. Ottesen,
5. Det. D. Kent,
6. Det. R. Townsend,

7. Patn. G. O'Rourke,
8. Patn. F. Gilford,

Present in Court: (11:20 o'clock A.M.)

9. Mr. J. B. Kiefer, Attorney at Law, National Bank of Commerce Building, New Orleans, La., representing the City of New Orleans.

Reported by: Gerry Heaton, Stenographer.

[fol. 12] Court: Mr. Kiefer telephoned the Court to say he was occupied in the District Court of Jefferson Parish, which is a Court of superior jurisdiction. Contacted his office twice, and Mr. Kiefer is not available for our telephone calls and has not replied. At this time I would like to state that all City witnesses that are listed on the affidavits, Lt. F. Martello, Patn. E. Boepple, Patn. J. Ottesen, Det. D. Kent, Det. R. Townsend, Patn. G. O'Rourke, and Patn. F. Gilford are all present in Court today.

Defendant is also present in Court. His attorney is present in Court. However, the City Attorney has informed the Court, through his office, that he is involved in a matter in the District Court of Jefferson Parish. Let the record show that the following City witnesses are all present in Court at this time:

1. Lt. F. Martello
2. Patn. E. Boepple
3. Patn. J. Ottesen
4. Det. D. Kent
5. Det. R. Townsend
6. Patn. G. O'Rourke
7. Patn. F. Gilford

[fol. 13] however the City Attorney is not available and therefore the matter is going to be re-set.

Attorney Dan A. Spencer: Mr. Wainwright has traveled a distance of seventeen hundred miles. I traveled three hundred miles to be here today. I would like to go to trial if at all possible.

Court: This is the information we have received from Mr. Kiefer's office, and we have made two attempts to contact him.

Attorney Dan A. Spencer: I am asking leave to file copies of letters written on July 7, 1965 to the Clerk of the Municipal Court, 500 N. Rampart Street, New Orleans, La., a copy of which was sent to Honorable Judge Bucaro, Municipal Court, Section B, 500 North Rampart St., New Orleans, La.; to Honorable Judge, Municipal Court, Section A, 500 North Rampart St., New Orleans, La., and a copy to my client Mr. Stephen R. Wainwright, 36 South St., Brockton, Massachusetts, and I now file in evidence this copy of letter requesting to be notified if the case was to be held today, in view of the fact that defendant was travelling from Massachusetts, and his attorney from Shreveport, Louisiana to be present today.

[fol. 14] Court: Let the record reveal all parties served, however, the City is not prepared because of the fact that Mr. Kiefer is in a Court of superior jurisdiction. That is the information received from his office. The Court is ready, willing and able to hear the matter.

Attorney Dan A. Spencer: I move that the case be dismissed for non-prosecution by the City.

Court: Motion is denied. Anything else you want Mr. Spencer.

Attorney Dan A. Spencer: No, sir.

11:20 o'clock A.M.—July 16, 1965

Court: Let the record indicate that the Court is now back in session to accommodate defendant and his attorney.

Court to Defendant Stephen R. Wainwright:

Q. Are you uncomfortable standing?

A. No, but if I would have to do it for a long period of time I would be very uncomfortable.

Court: Let the record show the Court, since contacted by Mr. Kiefer, was certain he had notice of this matter, but information received from Mr. Kiefer is he didn't receive [fol. 15] timely notice, and he was since notified by telephone.

Attorney J. B. Kiefer, representing the City of New Orleans: While I was present at the time of the arraignment, the cases had not been allotted, and that when they were allotted these cases were set for trial in the division to which they were allotted, and that this is an additional reason today, that I had absolutely no notice of the date upon which these matters were set for trial.

Court: Are you prepared for trial Mr. Kiefer?

Attorney J. B. Kiefer: I am not prepared for trial because I didn't know the matter was set for today.

Court: I would prefer granting it to you but I think I will not.

Attorney Dan A. Spencer: I move that the defendant be allowed to sit down because he has a bad back.

Stephen R. Wainwright, defendant, being duly sworn, testified:

Attorney Dan A. Spencer to Stephen R. Wainwright:

Q. State your name.

A. Stephen R. Wainwright.

Q. You have a physical disability?

A. I have a bad back.

Q. Any other physical disability?
A. I am presently under treatment for blood ulcers.
Q. Any further questions?

Attorney J. B. Kiefer: I have no objection.
Court: Have a seat Mr. Wainwright.
[fol. 16] Attorney J. B. Kiefer: I would like the witnesses to be sequestered.
I would like to call Lt. F. Martello.
Attorney Dan A. Spencer: I would like the City witnesses not to discuss the case amongst themselves until the matter is concluded.
Court: Call them back. (Witnesses enter Court) The Attorney for Defendant has requested that I instruct you not to discuss this matter, and you are so instructed.

Lt. Francis Martello, being duly sworn, testified:

Attorney J. B. Kiefer to Lt. Francis Martello:

Q. State your name please.
A. Lt. Francis L. Martello.
Q. You are a member of the New Orleans Police Department, so employed on Friday, October 13, 1964, at approximately one o'clock A.M.?

Attorney Dan A. Spencer: I object.
Court: Answer the question.

A. Yes.

Attorney J. B. Kiefer to Lt. Francis Martello:

Q. Do you recognize defendant in Court?
A. Yes.
Q. Where is he?
A. Sitting in the first seat of the first row.
[fol. 17] Q. Please tell the Court when you first saw him on or before the date of October 13th, 1965.

I wish at this time to amend the record to reflect 1964 instead of 1965.

Court: Hand me the record and I will amend it to read 1964. The Court feels that this is a typographical error.

Attorney J. B. Kiefer to Lt. Francis Marcello:

Q. In that regard it is your testimony you were so employed by the New Orleans Police Department on the 13th day of Friday, October, 1964?

A. Yes.

Q. Please tell the Court when, on, or before that date you first saw the defendant and where?

A. I saw the defendant in the First District Station.

Q. When you first saw him?

A. In the First District Station.

Q. That was the first time you had seen him that day?

A. Yes.

Q. You hadn't seen him before you came to the First District Station?

A. Correct.

Q. In what capacity were you serving in the First District Station?

A. Lieutenant on platoon.

Q. Under what circumstances did you see him in the [fol. 18] First District Station?

A. He was under arrest.

Q. Do you recall the arresting officers?

A. Yes. Officer Boepple and Officer Ottesen.

Q. Please tell the Court what you observed at that date and time.

A. He was under arrest by Officer Boepple and Officer Ottesen. He was placed in the booking cage, and he was booked, and I had asked him to remove his jacket, which is part of the booking procedure, which is outlined in the manual of the New Orleans Police Department.

Mr. Wainwright refused to take his jacket off. I explained all prisoners must be thoroughly searched and he

should cooperate with us by removing his jacket for identification purposes, and also for any weapons, which a person may have on him at the time he is booked for the security of the prisoner and the Police Officer.

He again refused to take his jacket off, so I instructed him I would have the jacket removed by the doorman.

[fol. 19] He again refused. He walked into a corner grabbed his jacket by his hands, folding his arms, and he said, "If you want this jacket off take it off".

Q. Please show the Court just what you mean.

A. (Lt. Martello demonstrates) He went into the corner crouched down, and he said, "If you want this jacket off take it off". I instructed Officer Gilford and Officer O'Rourke to remove his jacket.

Q. Did he give you any reason why he didn't want his jacket removed?

A. He said that he was a law student. He knew the law and he didn't want the jacket off.

Q. Proceed.

A. Officer O'Rourke and Officer Gilford asked him to take the jacket off and he didn't respond, so they physically took the jacket off of him. He done everything in his power to keep them from removing the jacket. In this operation the officers were bounced from wall to wall physically, and with the assistance of a couple of other police officers they put handcuffs on one of his arms, and they removed his [fol. 20] jacket.

Q. No other questions at this time.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Lt. Martello, how did you know the defendant was under arrest?

A. The officers told me he was under arrest.

Q. That is the only knowledge you had?

A. Yes, correct.

Q. Were you present when he was brought into the First District Station?

A. I was not present when he was brought in.

Q. Do you know how long he had been in there before you came in?

A. A very short while.

Q. Where was he in the Police Station when you first saw him?

A. In the Desk Sergeant's Room.

Q. That is behind the cage as one walks into the station?

A. No. Behind the cage there is a Desk Sergeant's booking area or cage, in the rear of that is a booking area. There is a walk-way, to the right is the Captain's room and to the left . . .

Q. This is a separate office?

A. Separate office.

Q. It is common practice to take a prisoner into the Desk Sergeant's office?

[fol. 21] A. It is. Yes. It depends on what he is charged with.

Q. A person charged with vagrancy, it is a common practice to take such a person into the Desk Sergeant's office?

Attorney J. B. Kiefer: I object.

Court: Let's hear him answer it.

Lt. Francis Martello:

A. It depends on the case. As a general rule more people are brought into the Desk Sergeant's area depending on what they are charged with. Traffic violations, no. If you want to question a person, yes.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. For what purpose was the defendant taken into the Desk Sergeant's office?

A. I wasn't present. I assume it was to question him.

Q. When you walked in was he being questioned?

A. I couldn't hear if he was. I wouldn't know if he was or not.

Q. Was he talking to someone when you came in?

A. When I walked into the station the officer came up to me and spoke to me.

Q. With regard to Mr. Wainwright?

A. That is correct.

[fol. 22] Q. What did he say to you?

A. He had Mr. Wainwright under arrest.

Q. Did he say anything else?

A. Yes, he did.

Q. What did he say?

A. He stated . . .

Attorney J. B. Kiefer: I object until he is identified.

Court: Who is the officer?

Lt. Francis Martello:

A. Officer Boepple.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. What did he say to you?

Attorney J. B. Kiefer: I object. Officer Boepple is here and can testify as to what he said.

Court: Answer the question Lt. Martello.

Lt. Francis Martello:

A. He said he had subject under arrest. He fit the general description of a subject who was wanted for murder. Also, the subject who was wanted for murder had a tattoo on his left arm "born to raise hell". He showed me a composite or drawing of one Johnnie McTaylor. He said that this man would not answer any questions concerning this investigation. He had asked this man on the scene to remove his jacket for the purpose of identification. This man was informed that he fitted the general description of a man wanted as a suspect in a murder case. This [fol. 23] arrested subject had no identification on him

whatsoever, was very belligerent; he attempted to walk off on three different occasions, and was possibly using subterfuge to evade the matter.

Q. Anything else?

A. I asked him to remove his jacket.

Q. This was in the Desk Sergeant's office?

A. Yes.

Q. What did he say then?

A. He demanded the right to use the telephone. He said he wasn't going to remove his jacket. I told him he has a right to use the 'phone. I said all right, we will book you first. He wanted to use the telephone. I told him you have to be booked before you can use the telephone. I told him he had to be searched before he could use the telephone. This is what he objected to.

Q. Do you know what the term frisk a prisoner means?

A. Generally on the street where you pat a person down for obvious weapons.

Q. Did you frisk the defendant in the police station?

A. No.

Q. Did anyone else in your presence frisk him?

[fol. 24] A. No.

Q. Do you know if Officer Boepple had frisked him prior to bringing him into the station?

A. No.

Q. Is it customary police procedure to do so?

A. Yes.

Q. You assume they had done so?

A. Yes.

Q. Does frisking a defendant reveal whether or not he has weapons on him?

Attorney J. B. Kiefer: I object.

Court: Sustained.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Describe the jacket Mr. Wainwright had on.

A. I believe it was a real lightweight jacket.

Q. Very thin?

A. Yes, very thin.

Q. Do you know what he had on under it?

A. Not at that time, but after we took the jacket off we did.

Q. What did he have on under it?

A. A T-shirt.

Q. It wasn't possible for you to determine whether or not he had any weapons on him without taking the jacket off?

[fol. 25] A. No, sir.

Q. Do you take a person's pants off to search for weapons?

A. It depends on the case.

Q. How about vagrancy?

A. Yes, depending on the case.

Q. Always?

A. Not always.

Q. How many times in the last two weeks have you seen members of the New Orleans Police Department remove trousers to see if a person had weapons on him?

A. (No answer)

Q. Did you ask Mr. Wainwright to remove his trousers?

A. No, sir. No need to.

Q. Why no need to?

A. He was throughly searched by the competent doorman we have. I was satisfied.

Court: Were you searching for weapons or marks?

Lt. Francis Martello:

A. To determine whether or not he had a mark on his arm.

Court: Are "shakedown" and "frisk" related?

Lt. Francis Martello:

A. Generally speaking "shakedown" means frisk. Sometimes it is used to search a prisoner. It depends on the Officer.

Attorney Dan A. Spencer to Lt. Francis Martello:

[fol. 26] Q. You refused to allow Mr. Wainwright to use the telephone until his jacket had been ripped from him?

A. No I didn't refuse him; he had to be booked and searched.

Q. You didn't allow him to use the telephone?

A. He didn't make an issue of it.

Q. He did ask to use the telephone before he was searched?

A. Yes. I told him no he had to be booked and searched first.

Q. You refused him to use the telephone?

A. He used the telephone after he was searched.

Q. You refused to allow him before he was searched?

A. No.

Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

A. He tried to keep it on by holding it.

Q. How?

A. By folding his arms. (demonstrates)

Q. He didn't do anything else?

A. No, not to my knowledge.

Q. If Officer O'Rourke and Officer Gilford got thrown [fol. 27] around the room, it was through their own effort?

A. No, it was the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

Q. He didn't do anything but try to hold the jacket on?

A. They tried to take it off, and he was trying to keep the jacket on.

Q. He held very still?

A. No, it was a struggle.

Q. Did he strike out at the officers?

A. No.

Q. Did he kick the officers?

A. I didn't see him. He could have. I didn't see him. It wasn't visible to me.

Q. How many officers were involved in an attempt to take his jacket off of him?

A. Officer Gilford, Officer O'Rourke, Officer Wilson and Mr. Kent—four.

Q. Lt. Martello, when you first entered the police station you were informed by the officer present that Mr. Wainwright refused to answer questions regarding this murder investigation?

Attorney J. B. Kiefer: I object.

Court: Permit the question.

[fol. 28] Attorney Dan A. Spencer to Lt. Francis Martello:

Q. When you first walked into the police station and was informed by the officer that Mr. Wainwright refused to answer questions regarding this murder investigation, didn't you say "Take that dirty S.O.B. in the interrogation room and take that jacket off of him"?

A. No.

Q. Did you say anything of the kind?

A. No.

Q. Did they take the jacket off of Mr. Wainwright on your command?

A. My sole command.

Q. Did you not curse Mr. Wainwright in the police station?

A. No.

Q. Was Mr. Wainwright asked if he wanted to call an attorney before he was searched?

A. No. He wanted to use the telephone.

Q. Did you assist the officers in taking his jacket off?

A. No, but I ordered it.

Q. You didn't touch him yourself?

A. No.

Q. What were the names of the other officers besides O'Rourke and Gilford?

A. Officer Kent and Officer Townsend, I believe.

[fol. 29] Q. How about Officer Boepple?

A. He was on the outside; so was Officer Ottesen, I believe. I am not sure. I could be wrong.

Q. Five of them?

A. Four or five. I am not positive.

Q. Did you see them strike Mr. Wainwright?

A. No.

Q. Did you see any of them knee him?

A. No.

Q. Did you see any of them twist his arm behind a bar?

A. No. What kind of a bar?

Q. A steel bar?

A. No steel bars in the First District. They had a handcuff on his arm. I don't know whether they twisted it or not. They could have.

Court: If they had twisted his arm, was there reason to?

Lt. Francis Martello: If they did it was logical in my opinion.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Lt. Martello you testified that the primary purpose for removal of the jacket was for identification purposes, was that correct?

A. Correct.

Q. How did you plan to identify him by the tattoo?

A. Correct.

[fol. 30] Q. On what part of his body?

A. Left forearm.

Q. Were there any members of the New Orleans Police Department who, to your knowledge, could have identified this murder suspect had they seen him?

A. No. Not by sight but by investigation. In the line of investigation.

Q. How are composites drawn up, Lt. Martello?

A. By a specialist in the Police Department, who is a technician that we have, who interviews various witnesses and suspects and from their words he draws a picture or photograph.

Q. Do you know if the murder suspect had ever been arrested in New Orleans before?

A. Which one?

Q. The one you mistakingly identified Mr. Wainwright as?

A. It has never been clarified whether the man we were looking for as the murder suspect, is the man who committed the murder. It is still an open case.

Q. Lt. Martello, what was the name of the person you took Mr. Wainwright for?

[fol. 31] A. Johnnie McTaylor.

Q. Has he ever been arrested by the New Orleans Police Department before?

A. I don't know.

Q. Lt. Martello, is it not true that two police officers who could identify Johnnie McTaylor were on their way to the Police Station at the time you ripped the clothing off Mr. Wainwright?

A. I didn't rip the clothing off of him. I didn't know if these officers had specific knowledge they could identify him.

Q. Is it not true that these two officers were off their way to the station at the time?

A. I had no knowledge of this.

Q. Did you later learn that two such officers were on their way to the Police Station?

Court: The Court will rule the question is irrelevant and the Officer need not answer it.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Lt. Martello did two officers, who could have identified the murder suspect, come to the First District Police Station on the night Mr. Wainwright was arrested?

[fol. 32] A. Two police officers from homicide who came to the First District Station—what knowledge they had, I don't know.

Q. You don't know whether or not they came there to identify Mr. Wainwright or not?

A. They were at the station. They were assigned to this case. Whether they could, or could not identify Mr. Wainwright as one Johnnie McTaylor I don't know.

Court: All information is in the record on the previous question. No objection by the City and the City permitted this information in the record later.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Lt. Martello, before Mr. Wainwright's clothes were torn off of him, did any officer, Officer Boepple, or any one else, tell you they had called and some one was coming over to identify the defendant?

A. (No answer)

Q. No further questions.

Attorney J. B. Kiefer to Lt. Francis Martello:

Q. The First District, which is located at Basin and St. Louis Streets, is that in the City of New Orleans?

A. Yes. 501 N. Rampart.

[fol. 33] Q. How long have you been with the New Orleans Police Department?

A. I am in my seventeenth year.

Q. Describe to the Court the conduct of the defendant at the time of the incident?

Attorney Dan A. Spencer: I object. This has already been covered.

Court: This has been covered. Lt. Martello the officers who removed the jacket from Mr. Wainwright subsequent to what you called a struggle, did any of them have marks, bruises, or torn clothing?

Lt. Francis Martello: No.

Attorney Dan A. Spencer to Lt. Francis Martello:

Q. Lt. Martello, why didn't you file an affidavit against Mr. Wainwright for assault prior to May 14th of this year?

Attorney J. B. Kiefer: I object. The Office of the City Attorney.....

Court: Sustained.

Officer George O'Rourke, being first duly sworn, testified:

Attorney J. B. Kiefer to Officer George O'Rourke:

Q. State your name.

A. George O'Rourke.

Q. Are you a member of the New Orleans Police Department and so employed on Friday, October 13, 1964, at approximately 1:25 AM?

[fol. 34] A. Yes.

Q. Where were you serving at that time?

A. Doorman at the First District.

Q. In that capacity did you have any occasion to see the defendant? Do you recognize Stephen R. Wainwright?

A. Yes.

Q. Where is he?

A. That is Mr. Wainwright. (Pointing) That is Mr. Spencer. (Pointing)

Q. Mr. Wainwright is seated in the first row?

A. Yes.

Q. Do you recall the incident, which occurred at the First District Station on that date and time?

A. Yes.

Q. Did it involve the defendant?

A. Yes.

Q. Please tell the Court what occurred.

A. Mr. Wainwright was put behind the booking cage, and he was placed on the books with charges that the officers placed upon him. After the charges were placed, he was asked to remove a jacket he had on. The officers [fol. 35] wanted to see if he had a tattoo on his arm. He was picked up as a suspect that may have been wanted for murder.

Mr. Wainwright put his arms over his chest and backed up into a corner. Lt. Martello asked him to take the jacket off, and he just looked at us. He was asked again. He said, "If you want this jacket you will have to take it off."

We approached Mr. Wainwright, Officer Gilford and myself. Officer Gilford to the left, and I am on the right. We got hold of each of his arms. We tried to pry his arms apart, and in the meantime we were bounced from wall to wall and bench to bench and back again.

Court: Demonstrate.

Officer George O'Rourke: Well I tried to get one arm and Gilford the other. Mr. Wainwright when I tried to get his right arm, would rush me to the side, and when Gilford tried to get the left arm, he would push him to the side. We went back and forth.

Court: What is your weight Officer O'Rourke?

Officer George O'Rourke: At that time about one hundred and eighty pounds.

Court: What is your age?

[fol. 36] Officer George O'Rourke: Forty-four.

Court: The Court observed Mr. O'Rourke. He has a little stomach but mostly brawn or muscle.

Attorney J. B. Kiefer to Officer George O'Rourke:

Q. Who told you to remove this jacket?

A. Lt. Martello.

Q. Did you remove the jacket?
A. Yes.
Q. Were you injured in any way?
A. No. A little soreness, here and there.
Q. No further questions.

Attorney Dan A. Spencer to Officer George O'Rourke:

Q. Mr. O'Rourke, were you present when Mr. Wainwright was brought into the Station?
A. Yes.
Q. Where were you?
A. Behind the booking cage.
Q. Was Lt. Martello there then?
A. I cannot recall if he was in the area at the time. We sit back there to catch up on the Manual or any other items we have to read up on.
Q. What took place immediately upon Mr. Wainwright's being brought in? What did the officers do with him when they brought him in?
[fol. 37] A. I don't know.
Q. You were there?
A. In the booking cage.
Q. Did you see them bring him in?
A. No.
Q. When did you see him first?
A. When he was brought from the Interrogation Room to be brought to the Booking Room.
Q. He had been in the Interrogation Room?
A. I assume.
Q. Did you hear Mr. Wainwright ask to use the telephone?
A. Yes.
Q. When was this?
A. After he was booked and put up a struggle to get his jacket off.

Q. He didn't ask to use it before his jacket was removed?

A. No.

Q. When he was brought up to be booked, did he ask to use the telephone?

A. No, sir.

Q. After he was booked and before the jacket was removed, did he ask to use the telephone?

A. No, sir.

Q. Did he ever ask to see a lawyer?

A. No, sir.

[fol. 38] Q. How many officers did it take to get his jacket off?

A. Three of us. Two of us and when we got his right hand away from his chest, I asked for handcuffs. Officer Kent gave them to me.

Q. Other than that no one else assisted you?

A. Yes, Officer Gilford.

Q. Were other officers present besides Officer Gilford and yourself?

A. No, sir. Officer Gilford and myself and during the struggle Officer Kent came to our assistance.

Court to Officer George O'Rourke:

Q. The booking cage and the interrogation office are two separate rooms?

A. Yes.

Q. Could you be in the interrogation office talking to some one and some one in the booking cage not know you were in there?

A. Yes.

Q. Completely separate?

A. Yes.

Q. Closed door?

A. Yes.

Attorney Dan A. Spencer to Officer George O'Rourke:

Q. What did Officer Kent do?

[fol. 39] A. Helped Officer Gilford restrain Mr. Wainwright from further pushing us against the wall while the handcuffs were put on Mr. Wainwright.

Q. How was he pushing you around? Did he strike out at someone?

A. No. Like a football player going through a line.

Q. Did he try to run?

A. No, dancing from wall to wall.

Q. Did he do that because each of you were pulling on his arms?

A. He was trying to keep us from getting his arms.

Q. You pulled one way; Officer Gilford the other?

A. Yes, trying to get his arms apart.

Q. Immediately after you took his jacket off what happened?

A. His right arm was removed from the jacket and a handcuff put on. Left arm removed and he was handcuffed. He calmed down; then he was asked to use the 'phone. The handcuff was removed from his left arm and he was allowed to use the 'phone and rehandcuffed and brought to F.B.I. for processing.

Q. Were you standing next to him when he used the telephone?

[fol. 40] A. I was standing by him.

Q. He was handcuffed to you?

A. No, I was holding the handcuff.

Q. Did he finish using the telephone?

A. Yes.

Q. Officer O'Rourke did you hang the 'phone up or did Mr. Wainwright?

A. Mr. Wainwright.

Q. Did you curse Mr. Wainwright?

A. No.

Q. Did you strike Mr. Wainwright?

A. No.

Q. You didn't strike him between the legs with your knee, did you?

A. No.

Court: Why didn't you strike him?

Officer George O'Rourke:

A. We were trying to subdue the man, to keep from hurting him and getting ourselves hurt, as we had to get the jacket off.

Attorney Dan A. Spencer to Officer George O'Rourke:

Q. You didn't see Mr. Wainwright when he was first brought into the Police Station?

A. No.

Attorney J. B. Kiefer to Officer George O'Rourke:

Q. Your testimony has been that you didn't know how long Mr. Wainwright was in the station before he was brought before you, is that correct?

A. Yes.

[fol. 41] Q. Therefore, you wouldn't know whether or not he had made a request of someone else to use the telephone other than yourself, before he was brought to you, is that correct?

A. Yes. If he asked someone else I had no knowledge of it.

Q. To clarify your testimony, he made no request to use the telephone until after the incident, that is only insofar as in your presence, right?

A. Right.

Q. You don't know what requests, if any, were made by Mr. Wainwright before he was brought before you?

A. That is right.

Q. Do you know in what capacity Officer Kent serves?

A. Assigned to the Detective Bureau.

Q. Do you know for what purpose he was there?

A. No, sir, I had no idea.
Q. No other questions.

Attorney Dan A. Spencer to Officer George O'Rourke:

Q. Immediately after Mr. Wainwright was brought out of the Interrogation Room were you standing next to Lt. Martello?
[fol. 42] A. No, sir I was in the booking cage.
Q. Where was the Lieutenant?
A. I cannot say.
Q. Was he there?
A. I presume he was.
Q. You don't know he was?
A. No. Where at?
Q. How long after Mr. Wainwright was brought out of the Interrogation Room into the booking cage, did you notice Lt. Martello's presence?
A. When they proceeded to book Mr. Wainwright.

Attorney Dan A. Spencer: I move for a directed verdict.
Court: Denied.

Officer E. Boepple called by defense:

Officer E. Boepple, being duly sworn, testified:

Attorney Dan A. Spencer to Officer Boepple:

Q. Officer Boepple, do you know the defendant in this case, Stephen Wainwright?
A. Yes, I do.

Attorney J. B. Kiefer: I object.
Court: Under what circumstances do you know Stephen Wainwright, Officer Boepple?
Officer E. Boepple: I arrested the subject.

Attorney Dan A. Spencer to Officer E. Boepple:

Q. When did you arrest the subject?

[fol. 43] A. October 13, 1964.

Q. After the arrest did you take him to the First District Police Station?

A. I did.

Q. Did he ask you immediately upon being taken to the Police Station, to use the telephone to contact an attorney?

A. He asked me when he would be allowed to use the telephone.

Q. What did you tell him?

A. As soon as his name was on the book.

Q. What did you do with him as soon as you brought him to the Police Station?

A. Kept him in the Interrogation Room for a period of approximately seven to ten minutes.

Q. Was anyone else being booked at the time?

A. I think there were other prisoners there. I don't know for sure.

Q. Any reason he wasn't booked immediately?

A. I was awaiting arrival of two homicide officers, who I assume would be connected with the matter eventually. I wanted to await their arrival.

[fol. 44] Q. You suspected him of being a suspect in a murder case?

A. Correct.

Q. These two officers could have identified that murder suspect, is that correct?

Attorney J. B. Kiefer: I object.

Court: Sustained.

Attorney Dan A. Spencer to Officer E. Boepple:

Q. You didn't allow Mr. Wainwright to use the telephone until some ten or fifteen minutes after he was brought into the station?

Attorney J. B. Kiefer: I object.

Court: Sustained. This is a defense witness not a City witness.

Attorney Dan A. Spencer to Officer E. Boepple:

Q. How long did you keep Mr. Wainwright in interrogation before being brought out to be booked?

A. Seven to ten minutes.

Q. Why was he brought out to be booked at the time?

A. Orders of Lt. Martello.

Q. In what manner did he give these orders? What were his exact words?

A. He asked me if that man was under arrest. I said yes. He said for me to bring him out and book him.

Q. What happened then?

[fol. 45] A. I don't know. I went to roll-call room, someone had called me back there from the Armed Service Police.

Q. Did you ever see Mr. Wainwright again that morning?

A. I don't think so, Mr. Spencer. I don't recall.

Q. No further questions.

Attorney J. B. Kiefer to Officer E. Boepple:

Q. You are a member of the New Orleans Police Department?

A. I am.

Q. So employed on Friday, October 13, 1964?

A. I was.

Q. No other questions.

Officer John Ottesen, called by defense:

Officer John Ottesen, being first duly sworn, testified:

Attorney Dan A. Spencer to Officer John Ottesen:

Q. State your name please.

A. John Ottesen.

Q. What is your occupation?

A. Police patrolman assigned to the First District.

Q. Have you ever seen Mr. Wainwright before?

A. I have.

Q. When did you first see him?

A. Friday, October 13, 1964 about 12:30 AM.

[fol. 46] Q. Did you arrest him that night?

A. I did.

Q. Did you bring him to the First District Station?

A. Correct.

Q. What did you do when you brought him to the station?

A. When we brought him to the station we brought him into the Interrogation Room; questioned him as to his name, place of birth, etc.

Q. Did he answer these questions?

A. He answered his name; where he lived, and said he was a law student. He didn't want to tell us any other information.

Q. Did he ask to use the telephone?

A. I don't know.

Q. You don't recall whether or not he asked you?

A. I don't remember.

Court: He may have?

Officer John Ottesen: It's possible.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. How long was he in the Interrogation Room?

A. Ten or fifteen minutes, and we telephoned for the Lieutenant.

Q. Where was he?

A. Out in the car.

Q. What did you call him for?

[fol. 47] A. We had a possible suspect in a murder case. We needed someone of higher knowledge to question the subject. We also notified the Detective Bureau.

Q. Why did you notify the Detective Bureau?

A. They had specifically asked us to check the vicinity of the French Quarter for a suspect wanted in a murder case.

Q. Why did you call them?

A. Suspect fitted the description of the wanted subject.

Q. Did you call them to send someone?

A. They had a better knowledge of the person than we had.

Q. What happened when Lt. Martello arrived?

A. The Lieutenant asked him a few questions; he said his name; where he lived; and that he was a law student.

Court: The Court at this time is offering an instanter subpoena to Mr. Spencer if he wishes to have these two individuals with the Detective Bureau available so that they can answer if they knew one Johnnie McTaylor.

Attorney Dan A. Spencer to Officer John Ottesen:

[fol. 48] Q. What happened then after you called the Detective Bureau, and Lt. Martello arrived, what did you do, did you leave the prisoner, or did you stay there while he was booked?

Court: Subsequent to the calls to Lt. Martello and the Detectives' office, what did you do, Officer Ottesen?

Officer John Ottesen: Lt. Martello arrived and he questioned Wainwright, and wanted Mr. Wainwright to remove his jacket, because this was a vital incident in his identification, as to whether he was Johnnie McTaylor or not.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. Did you ever search Mr. Wainwright?

A. Yes, when we first interrogated the suspect.

Q. Did he have any weapons on him?

A. No.

Q. Were you certain he had no weapons on him?

A. We gave him a quick frisk—a pat down.

Court: Were you reasonably certain he didn't have any weapons on him based upon your frisk?

Officer John Ottesen: I was satisfied that he didn't have a weapon.

Attorney Dan A. Spencer to Officer John Ottesen:

[fol. 49] Q. Were you present in the First District Station when he was booked?

A. Yes.

Q. Had his jacket been taken off of him when he was booked?

A. He was asked to remove his jacket by Lt. Martello.

Court: Prior to the booking, was his jacket on or not?

Officer John Ottesen: He had his jacket on.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. Did he have his jacket on at the time he was booked?

A. I don't remember.

Q. Do you remember his ever having asked to make a telephone call after he was booked?

Defendant Stephen Wainwright to the Court: This officer here (indicating Officer O'Rourke) has been nodding his head.

Attorney J. B. Kiefer: If this officer is coaching this witness . . .

Attorney Dan A. Spencer: The Court's instructions have been violated.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. Was Officer O'Rourke making signals to you?

A. Not to my knowledge.

Q. Did you see him?

[fol. 50] A. You were standing right where he was seated.

Court: Have any of your statements been influenced by any one in this Court Room?

Officer John Ottesen: No, sir.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. Do you recall Mr. Wainwright either before, or after being booked, asking to use the telephone?

A. He might have. We explained he had to be booked and then use the 'phone.

Q. Why did he have to be booked before using the telephone?

A. Procedure.

Q. Is there a sign over there in the District Station?

A. Yes.

Q. Do you remember what it says?

A. I know they are allowed to use the telephone. Every instance I ever handled they were booked and then allowed to use the 'phone.

Q. In this case defendant was interrogated before he was booked? He wasn't booked immediately after being brought into the Station, is that not true?

Attorney J. B. Kiefer: I object.

[fol. 51] Court: Answer the question.

Officer John Ottesen: He was interrogated.

Attorney Dan A. Spencer to Officer John Ottesen:

Q. Before being booked?

A. Correct.

Q. Before being allowed to make a telephone call?

A. We asked him the same questions that we asked him out on the street.

Q. You were interrogating him about a possible murder case?

A. No. We wanted to establish his place of birth.

Q. You didn't ask him if he was Johnnie McTaylor?

A. I don't believe we ever asked him out right. I didn't ask him.

Q. You did interrogate him about possible murder suspect?

A. Correct.

Q. Before you booked him?

A. Yes we did.

Q. No further questions.

Attorney J. B. Kiefer: No questions.

Stephen R. Wainwright, defendant, being duly sworn, testified:

Attorney Dan A. Spencer to Stephen R. Wainwright:

Q. State your name.

A. Stephen R. Wainwright.

Q. What is your occupation?

[fol. 52] A. Graduate law student working for a lawyer in Massachusetts.

Q. For whom do you work?

A. George L. Wainwright.

Q. Is he related to you?

A. He is my father.

Q. On October 13th, 1964, what was your occupation?

A. Student of Law at Tulane University here in New Orleans.

Q. Have you since graduated from Tulane?

A. Yes, I have.

Q. You now have a Law Degree?

A. I have.

Q. Do you have any other College Degrees?

A. A Bachelor of Arts in Psychology from Wesleyan University.

Q. Do you have any previous convictions?

A. None.

Decision of the Court:

I find the defendant guilty and sentence him to pay a fine of $25.00 or serve thirty days in jail on each charge, and I am suspending same.

Attorney Dan A. Spencer: I wish to file a Motion for an Appeal.

Court: Granted.

Certificate

I hereby certify the foregoing to be a true and correct copy of the transcript of testimony and notes of evidence [fol. 53] in the above numbered and entitled cause.

New Orleans, Louisiana, July 30, 1965.

Andrew G. Bucaro, Judge.

Gerry Heaton, Stenographer.

First District J-7405-65 **AFFIDAVIT** H. Perez
DESK SERGEANT

State of Louisiana, City of New Orleans, Parish of Orleans

Second MUNICIPAL COURT, SECTION

THE CITY OF NEW ORLEANS, LA.
versus

Stephen R. Wainwright W. M. 25
829 Ursuline St.

Personally appeared before me, the undersigned

ANDREW G. BUCARO

Judge of the Second Municipal Court of the City of New Orleans, duly commissioned and sworn.

Lt. F. Martello
Patn. E. Boepple
Patn. J. Ottesen
Det. D. Kent
Det. R. Townsend
Patn. G. O'Rourke
Patn. F. Gilford

who having been duly sworn, doth depose and say:

That on Friday the 13th. day of October 19 65, at about 1:25 o'clock A. M., on Basin & St. Louis Street, between and Streets, within the jurisdiction of this Court, one

1964 A.G.B. 7/16/65

Stephen R. Wainwright

did then and there wilfully violate Ordinance No. 828 MCS Section 49-2 relative to

Resisting an Officer

All against the peace and dignity of the City of New Orleans.

Wherefore the deponent charges the accused with violating Ordinance No. 828 MCS Section No. 49-2 and prays that he be arrested and dealt with according to law.

Sworn to and subscribed before me, this 14 day of May 19 65

(Signed) Lieut Francis L. Martello

(Signed) Andrew G. Bucaro
Judge.

Color	Age	Male	Female	Where Employed	Address of Employer

Time Paroled _____ By Whom Paroled _____ For _____

NOTICE TO PRISONER:—You must appear in Second Municipal Court, 501 North Rampart St., 1 P M., 5/13/65 19____, without fail under penalty of fine and imprisonment.

FORM H. Q. No. 1

[fol. 54]

BOND SIGNED BY

Name

Address

AFFIDAVIT RECEIVED _____ 19__

No. 83469-A

THE CITY OF NEW ORLEANS

VERSUS

Stephen R. Wainwright

VIOLATING ORDINANCE:

49-2

PROSECUTOR:

$ 50.00 APPEARANCE BOND

5/14/65

Arraigned _____ day of _____ 19__

And Pleaded 3 N.G.

DECISION

May 21,1965 9 AM

Guilty

$25.00 or 30 days suspended

(Signed) Andrew S. Bucaro

JUDGE.

CITY WITNESSES:

NAME ADDRESS

DEFENSE WITNESSES:

NAME ADDRESS

Received In Court By _____ Date _____ Time _____

First District J-7405-65

AFFIDAVIT

H. Perez
DESK SERGEANT

State of Louisiana, City of New Orleans, Parish of Orleans

Second MUNICIPAL COURT, SECTION

THE CITY OF NEW ORLEANS, LA.
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829 Ursuline St.

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Lt. F. Martello
Patn. E. Boepple
Patn. J. Ottesen
Det. D. Kent
Det. R. Townsend
Patn. G. O'Rourke
Patn. F. Gilford

who having been duly sworn, doth depose and say:

That on Friday the 13th. day of October 19 64, at about 1:25 o'clock A. M., on Basin & St. Louis (First District Station) Street, between

and Streets, within the jurisdiction of this Court, one

Stephen R. Wainwright

did then and there wilfully violate Ordinance No. 828 MCS Section 42-24 relative to

Disturbing the peace by assult on Patn. George O'Rourke

All against the peace and dignity of the City of New Orleans.

Wherefore the deponent charges the accused with violating Ordinance No. 828 MCS Section No. 42-24 and prays that he be arrested and dealt with according to law.

Sworn to and subscribed before me, this 14 day of May 19 65

(Signed) Lieut. Francis L. Martello

(Signed) Andrew G. Bucaro
Judge.

Color	Age	Male	Female	Where Employed	Address of Employer

Time Paroled _____ By Whom Paroled _____ For _____

NOTICE TO PRISONER:—Your must appear in _____ Municipal Court, 501 North Rampart St., 1 P M., 5/24/65 19____, without fail under penalty of fine and imprisonment.

FORM H. Q. No. 1

[fol. 56]

43

BOND SIGNED BY

Name

Address

AFFIDAVIT RECEIVED _____ 19___

No. 83469-A et al

THE CITY OF NEW ORLEANS

VERSUS

Stephen R. Wainwright

829 Ursuline

VIOLATING ORDINANCE:

828 42-24

PROSECUTOR:

APPEARANCE BOND

$ 50.00

Arraigned _____ day of 5/14/65 19___

And Pleaded _____

DECISION

May 21,1965 9 AM

Guilty

$25.00 or 30 days suspended

Andrew G. Bucaro

JUDGE.

CITY WITNESSES: NAME ADDRESS

DEFENSE WITNESSES: NAME ADDRESS

Received In Court By _____ Date _____ Time _____

First District J-7405-65

AFFIDAVIT

H. Peres
DESK SERGEANT

State of Louisiana, City of New Orleans, Parish of Orleans

Second MUNICIPAL COURT, SECTION

THE CITY OF NEW ORLEANS, LA.
versus

Stephen R. Wainwright W. M.25
829 Ursuline St.

Personally appeared before me, the undersigned

Andrew G. Bucaro

Judge of the Second Municipal Court of the City of New Orleans, duly commissioned and sworn.

Lt. F. Martello
Patn. E. Bosiple
Patn. J. Ottesen
Det. D. Kent
Det. R. Townsend
Patn. G. O'Rourke
Patn. F. Gilford

who having been duly sworn, doth depose and say:

That on Friday the 13th. day of October 1964 at about 1:25 o'clock A. M., on Basin & St. Louis Street, between (First District Station) and Streets, within the jurisdiction of this Court, one

Stephen R. Wainwright

did then and there wilfully violate Ordinance No. 828 MCS Section 42-24 relative to

Disturbing the peace by assult on Patn. Frank Gilford

All against the peace and dignity of the City of New Orleans.

Wherefore the deponent charges the accused with violating Ordinance No. 828 MCS Section No. 42-24 and prays that he be arrested and dealt with according to law.

Sworn to and subscribed before me, this 14 day of May 1965

(Signed) Lieut Francis L. Martello

(Signed) Andrew G. Bucaro
Judge.

Color	Age	Male	Female	Where Employed	Address of Employer

Time Paroled _____ By Whom Paroled _____ For _____

NOTICE TO PRISONER:—Your must appear in Second Municipal Court, 501 North Rampart St., 1 P M., 5/13/65 19___, without fail under penalty of fine and imprisonment.

[fol. 58]

45

BOND SIGNED BY

Name

Address

AFFIDAVIT RECEIVED _____ 19___

No. 83469-A et al.

THE CITY OF NEW ORLEANS

VERSUS

Stephen R. Wainwright

829 Ursuline

VIOLATING ORDINANCE:
828 42-24 et al.

PROSECUTOR:

APPEARANCE BOND

$ 50.00

Arraigned _____ day of 5/14/65 19__

And Pleaded 1. N.G.

DECISION

May 21,1965 9AM
Re-set 7/16/65 - Ntify Bondsman
July 16,1965 9 AM Reset
See Steno's notes
Guilty -$25.00 or 30 days
suspended

Andrew G. Bucaro
JUDGE.

CITY WITNESSES:

NAME ADDRESS

DEFENSE WITNESSES:

NAME ADDRESS

Received In Court By _____ Date _____ Time _____

APPEAL BAIL BOND

State of Louisiana, City of New Orleans, Parish of Orleans

FIRST MUNICIPAL COURT

KNOW ALL MEN BY THESE PRESENTS, That we Stephen R. Wainwright as principal, and No Bond as surety, bind ourselves in solido, unto the City of New Orleans, in the following sums, to-wit:

The said Stephen R. Wainwright the sum of No. Bond Dollars,

The said _____ the sum of _____ Dollars,

The said _____ the sum of _____ Dollars,

The said _____ the sum of _____ Dollars,

of good and lawful money of the United States, for the true payment of which respective sums they and each of them, bind themselves, their respective heirs, executors and administrators firmly by these presents.

WHEREAS, the above bounden Stephen R. Wainwright has this day appealed from the judgment and sentence rendered by the Judge of the ~~Second~~ FIRST Municipal Court of the City of New Orleans,

against Stephen R. Wainwright condemning the said Stephen R. Wainwright, to pay a fine of $75.00 Dollars, or suffer imprisonment for a period of 90 Suspended Sentence Days in default of payment of said fine, in the cause City of New Orleans, vs. Stephen R. Wainwright No. 83469-A of the ~~Second~~ FIRST Municipal Court of the City of New Orleans.

[fol. 60]

NOW, therefore, the condition of the above obligation is such, that if the said Stephen R. Wainwright shall prosecute the said appeal with effect, and shall pay and perform any judgment that may be rendered thereon against Stephen R. Wainwright, then and in such case, the above obligation to be null and void, otherwise shall remain in full force and virtue.

_____	_____
_____	_____
_____	_____
_____	_____

TAKEN and acknowledged at the City of New Orleans, this 16 day of July 1935 before me Andrew H. Bucaro

Judge of the ~~Second~~ FIRST Municipal Court of the City of New Orleans

No. 83469-A

APPEAL BAIL

BOND

FIRST [redacted] MUNICIPAL COURT

City of New Orleans

vs.

Stephen R. Wainwright

829 Vaudine St.

AUG 11 REC'D

AFFIDAVIT OF SURETY
SECOND MUNICIPAL COURT

State of Louisiana,
City of New Orleans
Parish of Orleans.

_____ being duly sworn, deposes and says that he resides in the City of New Orleans, and that after paying all his just debts and liabilities, he is well and truly worth the sum of _____ Dollars, in property, all situated within the jurisdiction of this Honorable Court, viz: _____

and that he has not signed or executed any deed, note, bond, contract, assignment or instrument of any kind that will vitiate or prevent the enforcement of this bond.

Sworn to and subscribed before me, the 16 day of July 1965

Andrew D. Bruscato

Judge of the [redacted] Municipal Court
of the City of New Orleans

[fol. 61]

[fol. 62] Section 49-2. Resistance Unlawful.

It shall be unlawful for any person, by word or action, to resist an officer, or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, §2.)

Clerk's Office

Council of the City of New Orleans

City Hall, July 28, 1965

I hereby certify that the above is a true and correct copy of Section 49-2 of the Code of the City of New Orleans, as adopted by Ordinance No. 828 Mayor Council Series.

Roger L. Sarrat, Clerk of Council.

[fol. 63] Section 42-24. Disturbing Public Peace.

No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another. (C.C.S., Ord. No. 7637, §1; C.C.S., Ord. No. 7809, §1.)

Clerk's Office

Council of the City of New Orleans

City Hall, July 28, 1965

I hereby certify that the above is a true and correct copy of Section 42-24 of the Code of the City of New Orleans, as adopted by Ordinance No. 828 Mayor Council Series.

Roger L. Sarrat, Clerk of Council.

[fol. 64]

IN THE CRIMINAL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

83469—A, et al

CITY OF NEW ORLEANS, STATE OF LOUISIANA,

v. Number 192-168-"D"

STEPHEN R. WAINWRIGHT.

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE FIRST MUNICIPAL COURT, CITY OF NEW ORLEANS, STATE OF LOUISIANA

Dan A. Spencer, 3420 Greenwood Road, Shreveport, Louisiana, Attorney for Stephen R. Wainwright.

[fol. 65] To the Honorable the Judges of the Criminal District Court of the Parish of Orleans, State of Louisiana:

The petition of Stephen R. Wainwright, defendant in the case entitled "City of New Orleans v. Stephen R. Wainwright, No. 83469—A, et al," on the Docket of the First Municipal Court of the City of New Orleans, respectfully shows:

Statement of the Case

The defendant was convicted in the First Municipal Court of the City of New Orleans, on July 16, 1965, of violating certain municipal ordinances of the City of New Orleans.

On that same date, the defendant, through counsel, made both oral and written motions for appeal. The motion was granted by the Court, Honorable Andrew G. Bucaro presiding, and the Court set a return date of August 16, 1965. Contra: La.R.S. 13:2498.

By letter dated August 9, 1965, counsel for the defendant was advised by Mr. Arthur J. Boe, Clerk of the Municipal Court of New Orleans, that the defendant's appeal in this matter was ready to be filed in the Criminal District Court upon payment by the defendant of Forty-Three Dollars ($43.00) due the City of New Orleans. On August 11, 1965 counsel for defendant sent a check for Forty-Three Dollars ($43.00) to Mr. Arthur J. Boe, Clerk of the Municipal Court, and requested that he file the record in this case in the Criminal District Court.

Counsel for defendant has filed a brief on his appeal in the Criminal District Court on the basis of a copy of the transcript of the case which he had ordered from the court stenographer. It was only learned on October 18, 1965 that the record in this case had never been sent up to the Court. On that date, counsel for defendant contacted Mr. Arthur J. Boe, Clerk of the Municipal Court and upon inquiring as to why the record had not been sent up, was advised that Judge Bucaro had the record in this case and that Mr. Boe do nothing about the matter.

[fol. 66]

Ground on Which the Supervisory Jurisdiction of This Court Is Invoked

Petitioner shows that no appeal lies from the judgments and actions complained of and further shows that he will suffer irrevocable injury as a result of these judgments and actions unless remedial writs are granted by this Honorable Court for the following reasons:

Assignment of Error

The Municipal Court of New Orleans has no authority to hold the record in this case and should have sent it immediately to this Court after it was prepared.

Argument on Assignment of Error

Louisiana Revised Statute 13:2498—B provides:

"§ 2498 B. The court reporters of the court shall, in all cases, take down the testimony verbatim. The stenographic notes need not be written out unless an appeal is taken, in which case the testimony shall be written out and signed by the judge. *In cases of appeal the clerk shall prepare the record for the appellate court.* This will consist of the affidavit bond, testimony and every document, instrument, property or thing whatsoever in possession of the court, filed in the trial of the case, together with the ordinance or ordinances on which the prosecution is based. The clerk shall make, in duplicate, a list of each specific thing, whose correctness shall be certified to by the judges to one of the lists. *This record, and all it contains, and the signed list shall then be filed with the clerk of the criminal district court who will receipt for same after signing the other list. When the appeal is taken it divest the municipal court of New Orleans from all further jurisdiction in the case.*"

Louisiana Revised Statute 13:2498—D provides:

"§ 2498 D. In no case shall the appellant be responsible for any error, omission or oversight in the record of the appeal."

Wherefore, petitioner prays that his application for remedial writs be filed in this Honorable Court and that writs of Certiorari, Prohibition and Mandamus issue herein ordering and commanding the Judge of the First Munic-[fol. 67] ipal Court of the City of New Orleans to send forthwith the original records of the above case to this court for reviewing of the judgments and actions of the said Judge of the First Municipal Court and prohibit the said Judge from proceeding further in this case and the

respondent from prosecuting it further until the judgment be pronounced herein on the regularity of these proceedings. That the aforesaid Judge of the First Municipal Court and the respondent, the City Attorney, be ordered to immediately send up to this Court the entire record in this case.

Dan A. Spencer, Attorney for Defendant, 3420 Greenwood Road, Shreveport, Louisiana.

State of Louisiana,
Parish of Caddo:

Dan A. Spencer, being duly sworn, deposed and said that he is attorney for the petitioner in the above and foregoing application for remedial Writs of Certiorari, Prohibition and Mandamus; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to the City Attorney, postage prepaid and a copy has been mailed to the respondent Judge of the First Municipal Court, Honorable Andrew G. Bucaro, postage prepaid.

Dan A. Spencer.

Sworn to and subscribed before me, this 19th day of October, 1965.

Bert J. Leahy, Notary Public, Caddo Parish, La. My Commission Is for Life.

[fol. 68]

IN THE CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
No. 192-168—Section "D"

CITY OF NEW ORLEANS,
versus
STEPHEN R. WAINWRIGHT.

Appeal From First Municipal Court
City of New Orleans

JUDGMENT—March 2, 1966

This is an appeal by the appellant, Stephen R. Wainwright, from the judgment of the First Municipal Court of the City of New Orleans.

The defendant, Stephen R. Wainwright, was convicted in First Municipal Court of violation of Ordinance No. 828 M.C.S. Section 49-2 relative to resisting an officer and violation of Ordinance No. 828 M.C.S. Section 42-24 relative to disturbing the peace. He was found guilty and given a $25.00 fine on each charge which sentences were suspended and the defendant timely filed his appeal.

Counsel for defendant has urged several grounds for reversal of the convictions, which shall be considered, but at the outset this Court is of the opinion that the defendant was under arrest at the time the incidents, which form the basis of these charges, occurred.

The defendant was stopped and questioned by the arresting officers because, in their opinion, he fitted the description of a subject wanted for the crime of murder. The

officers had been furnished a composite drawing of the wanted subject and had been requested to search the vicin- [fol. 69] ity of the French Quarter. When the defendant was stopped in the French Quarter he was informed that he fitted the description of the wanted subject and that the wanted subject had a tattoo on his left forearm "born to raise hell". The defendant had no identification on him when he was stopped and he refused to remove his jacket for the purpose of identification. The defendant was belligerent and attempted to walk off on three different occasions and appeared to be using subterfuge to evade the matter. He refused to answer any questions except his name and that he was a law student. He would not tell his place of birth or give any other information. The officers then arrested him, placed him in a police car and took the defendant to the First District Station.

Under the circumstances, the arrest was legal. Louisiana Revised Statutes 15:60 provides that any peace officer without a warrant may arrest a person:

(3) When a felony has been committed and he has reasonable cause to believe that such person committed it.

"Almost without exception when the fact of felony is known to the police before arrest the courts have found the second prong i.e., the identity of the felon also to have been established. Stated factually, the cases hold that if the police learn from the victim, from their fellow officers, from their own observation at the scene of the crime or from reliable informants that a felony has in fact been committed, the courts require little more toward identifying the felon to warrant arrest and search. Bare description, presence near the scene of the felony, suspicious or furtive conduct, any evidence of this nature has been held to constitute probable cause to establish the identity of the felon." (People vs. Estrialgo 37 Misc. (2) 264, 233 N.Y.S. 2nd 558.)

Considering all of the facts and circumstances the police were justified and had reasonable cause to arrest the defendant. The Court feels that this entire episode could have been avoided if the defendant had merely revealed [fol. 70] his arm, disclosing no tattoo marks and had attempted to be more cooperative.

When the defendant was brought to the First District Station the facts concerning the arrest were brought to the attention of Lieutenant Martello, the superior of the arresting officers.

Lieutenant Martello attempted to question the defendant and he refused any information. Lieutenant Martello asked him to remove his jacket prior to being booked for identification purposes and to reveal any possible concealed weapon. The defendant at this time advised the officer if he wanted the jacket off, he would have to take it off. Lieutenant Martello instructed Officer O'Rourke and Officer Gilford to remove the defendant's jacket. The defendant then folded his arms and crouched and buffeted the officers in their efforts to remove the jacket. The conduct of the defendant was so violent that it was necessary to summon the assistance of a third officer, namely, Officer Kent before his jacket could be removed.

The conduct of defendant at this time was not resisting an officer within the definition and since criminal statutes must be strictly construed, the Court finds the defendant not guilty of resisting an officer. I have been unable to find any authorities as when the resisting arrest must occur. Arrest necessarily involves more than the original physical detention and it could be argued logically that arrest covers the transporting to the station, and booking and fingerprinting but since criminal statutes must be strictly construed in favor of the defendant, I hold that the conduct of the defendant was not, technically, resisting [fol. 71] within the wording of the ordinances for the reason that the definition of Resisting an Officer must be read together with the offense of resisting an officer, and one limits the other.

The Chief of Police and the officers, under his direction, have the responsibility of, first, maintaining the security of the District Stations and, secondly, to furnish information relative to arrested and suspected persons' name, fingerprints, photographs and identification to the Department of State Police. R.S. 15:581 et sequitur. The defendant was in police custody pursuant to a legal arrest and the officers had the right and the obligation to search the defendant for any concealed weapons, even though the defendant had been previously "frisked" for weapons on the street. This second search before locking up is more detailed because it has to cover not only obvious weapons but anything that may be used as a weapon or means of escape or injury to anyone. It is a matter of common knowledge that belts and ties are always taken from defendants before lockup to protect them as much as anyone else.

For the purpose of identification the police had a right to examine defendant's arm. If perchance the defendant had been the wanted subject and this forceful examination had disclosed his identity, evidence of such an identifying mark could have been testified to. Further, in many jurisdictions the defendant could have been compelled to exhibit his arm at the trial of the matter.

> "Generally, it is not considered to be a violation of the privileges against self incrimination to compel one who is accused or suspected of a crime to perform an act outside the court and not in the presence of the jury and to allow a witness to testify as to the act. This has been explained as arising from the fact that the [fol. 72] privilege is intended to protect the defendant as a witness and when such an act is performed outside of court, the evidence thereof comes from witnesses other than the defendant and therefore does not violate his privilege. Furthermore, it has been said that this is as much to exonerate the accused as it is to identify him as the perpetrator of the crime.

> Thus, a suspect has been required to try on garments such as a hat or a coat, to put a handkerchief over part of his face, to appear in a police lineup, to submit to a physical examination of his body, to submit to having his fingerprints or footprints taken, to assume certain poses, to be photographed, to speak for voice identification, and to surrender his shoes for the purpose of permitting them to be compared with tracks near the place where the crime was committed." 21 Am. Jur. 2nd P. 368.

> "Even in a courtroom during a trial a defendant may be required to stand and remove a visor so that witnesses attempting to identify him (or presumptively exonerate him) may have an unobstructed view of his features." People vs. Clark, 18 Cal. 2nd 449—116 P. 2nd 56.

In People vs. Lopez 384 P. 2nd 16 the defendant was convicted of murder and objected to being forced to appear in a lineup and appealed. The Court, in denying the appeal, stated:

> "Showups are a part of the investigation procedure and often result in the release of a suspect. The showup exposes subjects to view for purposes of identification or elimination but not incrimination." See also State vs. Hughes 154 So. 2nd 395—244 La. 744.

In the instant case the examination of the defendant by the police exonerated him of the charge or suspicion of murder. There is no evidence the police used unnecessary force in removing the defendant's jacket but, on the contrary, the testimony of the officer was to the effect that they tried to avoid being hurt by the defendant or hurting him, but that he bounced them from wall to wall. To hold that the police in circumstances such as this cannot make a reasonable search and examination of an individual in lawful police custody and that an individual can violently

oppose the action of police in doing their duty, would be to unduly hamper the police.

> [fol. 73] "The steady increase in the number of serious crimes throughout the United States is a matter of grave concern. Of course the constitutional rights of the individual should be protected. But in our zeal to safeguard those rights we must not be unmindful of the public interest involved and we should not erect any unnecessary barriers that will thwart the law enforcement officers in the performance of their duties to investigate, detect and secure evidence of crime." Hollingsworth vs. U. S. 321 F. 2nd. 342.

In State vs. Hughes 154 So. 2nd 395, 244 La. 774, objection was made to the introduction of photographs of the accused and the testimony of the coroner as to his examination of the accused, which were overruled. In affirming the trial court, the Supreme Court stated:

> "We do not think that permitting the coroner to testify as to his findings upon the physical examination made of the accused or the admission in evidence of pictures of the accused denied him due process of law simply because the examination was made and the pictures were taken while he was in custody of the police and without counsel. We know of no provision of the law which requires the consent of the person arrested and charged with a crime for these things to be done. Neither the testimony of the coroner nor the admission in evidence of the pictures violated defendant's constitutional privileges against compulsory self-incrimination. Underhill's Criminal Evidence (5th ed. 1956) P. 239, sec. 126. State vs. Roy 220 La. 1017, 58 So. 2d. 323. State vs. Robinson 221 La. 19, 58 So. 2nd 408. Counsel does not say that the admission of the testimony and of the pictures was contrary to any rule of evidence or violated any statute or law of this

state, and we do not think the facts and circumstances show that any constitutional right of the accused was violated."

Can it be successfully urged that a suspect or defendant cannot be physically forced to appear in a lineup; physically forced to submit to fingerprint and photograph; physically forced to submit to physical examination when the force used is not excessive and only such force is used as is necessary to overcome the resistance of the defendant. I think not. To hold otherwise would thwart the police in their normal investigative procedure.

[fol. 74] The judgment of the trial court and the sentence as to the verdict of guilty on the two charges of Disturbing the Peace, is affirmed.

New Orleans, Louisiana, March 2nd, 1966.

Thos. M. Brahney, Jr., Judge, Section "D", Criminal District Court, Parish of Orleans, State of Louisiana.

[fol. 75]

IN THE SUPREME COURT OF LOUISIANA

CITY OF NEW ORLEANS, STATE OF LOUISIANA,

VS. #48108

STEPHEN R. WAINWRIGHT.

#192-168 Section D

CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO CRIMINAL DISTRICT COURT OF THE PARISH OF ORLEANS, STATE OF LOUISIANA

Stephen R. Wainwright, Pro Se, 106 Main Street, Brockton, Massachusetts.

[fol. 76] To the Honorable the Justices of the Supreme Court of Louisiana:

The petition of Stephen R. Wainwright, defendant in the case entitled "State of New Orleans vs. Stephen R. Wainwright, #192-168, Section D, Criminal District Court, Parish of Orleans, State of Louisiana."

Respectfully Shows:

Statement of the Case

On October 13, 1964, just before one A.M., the defendant, Stephen R. Wainwright, was walking on the street near his home on Ursuline Street, New Orleans, when he was stopped by two police officers and ordered to remove his

clothes. The defendant did not have his draft card with him, but he gave his name and address. He refused to take off his clothes. He was, therefore, arrested for vagrancy by loitering, reviling the police and resisting arrest.

The defendant asked the police if he would be allowed to call his lawyer who would identify him, but this request was denied.

The defendant was taken to the police station where he was assaulted, brutally beaten and his clothing removed. The police then discovered that the defendant was not the man that they were looking for. They were looking for a [Vol. 77] man that was tattooed.

Following the beating of the defendant, the defendant was permitted to call his lawyer, but then was immediately taken to another police station so that his lawyer could not get in touch with him.

Several hours later, the defendant was released by the police and immediately went to a hospital for emergency treatment for his injuries.

At 10 P.M. that night, the defendant was arraigned and trial was set for December 4th, 1964. The trial of these complaints started on December 4th, 1964 before Judge Bucaro. The docket number of this case started as "Municipal Court, Docket No. 80503B".

After hearing part of the evidence of December 4th, 1964, Judge Bucaro, over the objection of the defendant, continued the case indefinitely.

No further hearings were held on this case until May 7th, 1965, at which time again Judge Bucaro heard only a part of the evidence, and then over the objection of the defendant continued the case to May 14th, 1965. On that date, at the termination of the government's case, the defendant moved for a directed verdict. Judge Bucaro took this Motion under advisement.

The judge then conferred with the prosecuting attorney and as a result of this conversation, new complaints were brought, to wit, resisting arrest and disturbing the peace.

[fol. 78] These offences were alleged to have occurred on October 13, 1964, seven months before.

A new case number was assigned to this new element in the case, given number 83469A.

The defendant insisted on immediate trial of these new complaints and insisted that the Judge make a decision on his Motion for Directed Verdict with respect to the original charges. Judge Bucaro refused to decide the Motion for Directed Verdict and refused to hear the complaints on May 14th and continued them to May 21st.

However, on May 17th, the defendant was advised that the cases would not be heard on the 21st, but instead were continued, over the objection of the defendant, to the 16th day of July, 1965. This necessitated the defendant travelling 3,000 miles in order to be present on the 16th of July, 1965.

On July 16th, 1965, Judge Bucaro still refused to take any action on the Motion for Directed Verdict with respect to the first half of the case, to wit, the original complaints of October 13, 1964, and he found the defendant guilty of the second half of the case, to wit, the new complaints which had been brought on May 14th, 1965.

These convictions were duly appealed to the Criminal District Court for the Parish of Orleans.

A stenographic transcript was made of the hearings on December 4th, 1964, May 7th, 1965, May 14th, 1965 and July [fol. 79] 16, 1965. However, the transcript of the evidence taken on December 4, 1964, May 7, 1965 and May 14, 1965 was never made a part of the record to be heard on the appeal, although request for the same was duly made by the attorney for the defendant.

On March 2nd, 1966, judgment was rendered by the judge of the Criminal District Court reversing the defendant's convictions on violation of Ordinance No. 828MCS, Section 49-2 relative to resisting an officer. The conviction was affirmed on the complaints alleging "disturbing the peace".

The crime for which the defendant now stands convicted, is Section 42-24 of the Code of the City of New Orleans,

which provides as follows:—Disturbing Public Peace:—"No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another". (C.C.S., 7809, Section 1.)

In the record tendered by the City of New Orleans to Judge Brahney, Jr., of the Criminal District Court, the vital parts of the transcript were not included so that Judge Brahney had no opportunity to make a sound decision on the record.

The foregoing statements of fact, insofar as they do not appear in the judgment of the Criminal District Court, are a part of the record in the first half of the case in the Municipal Court of the City of New Orleans, Case No. 80503B.

It will be impossible for this Court to make a full determination of the extent to which the rights of the defendant have been violated, without the court having the complete [fol. 80] record of the Municipal Court Case No. 80503B, and the defendant at this time respectfully requests that the record in case No. 80503B of the New Orleans Municipal Court be, by order of this Court, made a part of the record in this case for the purpose of determining this appeal.

Grounds for Supervisory Jurisdiction

The supervisory jurisdiction of this Court under Louisiana Constitution, Article 7, Section 10, is invoked.

[fol. 81] Assignment of Error

The defendant assigns as error on the part of the Criminal District Court of the Parish of Orleans, the following, viz:—

(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

(3) The defendant was denied his constitutional right to due process in that:

(a) The defendant was denied his right to have counsel present from the moment of his arrest.

(b) The defendant was deprived of his right not to be subject to unlawful search.

(c) The defendant was deprived of his right to a speedy trial.

(d) The defendant was deprived of his right to an impartial trial.

[fol. 82] Argument on Assignment of Errors

(1) There Was Insufficient Evidence as a Matter of Law to Find That the Defendant Committed an Assault on Anyone.

(2) There Was Insufficient Evidence as a Matter of Law to Justify a Finding That the Defendant Committed a Breach of the Peace.

The standard definition in Black's Law Dictionary for Assault is as follows:—

> Assault. An intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt, if not prevented. State v. Staw, 97 N.J.L. 349, 116A. 425; Naler v. State, 148 So. 880, 25 Ala.App. 486.

In affirming the conviction for assault, the Criminal District Court found the following fact, "The defendant then folded his arms and crouched and buffeted the officers in their efforts to remove the jacket."

It is evident from this finding that the defendant's only concern was to keep his clothes on. There was no unlawful offer of "corporal injury" by the defendant; no intent on the defendant's part to injure or harm anyone; and no one was put in fear of imminent peril by the defendant. The evidence merely shows that the defendant acted in self defense and resisted the removal of his clothing. This does [fol. 83] not constitute assault as a matter of law and under Section 42-24 of the Code of the City of New Orleans cannot be construed as a breach of the peace.

(3) The Defendant Was Denied His Constitutional Rights to Due Process in That

(a) The Defendant Was Denied His Constitutional Right to Have Counsel Present From the Moment of His Arrest.

(b) The Defendant Was Deprived of His Constitutional Right Not to Be Subject to Unlawful Search.

The defendant was privileged to resist the removal of his clothing. This was an unreasonable search under the circumstances. The defendant told the officers who he was, where he lived, and where he went to school, and requested that he be permitted to call counsel who could readily prove his identity. This request was denied.

Instead of making a reasonable investigation to determine the identity of the prisoner in their custody by contacting the officials at Tulane Law School, or the prisoner's counsel, the police chose instead to determine whether or not the defendant was the suspect in question by the simple expedient of ripping off his clothes to determine whether or not he had a certain tatoo.

Under these circumstances, this was a violation of the defendant's constitutional rights, an unreasonable search [fol. 84] which the defendant was privileged to resist.

(c) The Defendant Was Denied His Constitutional Right to a Speedy Trial.

(d) The Defendant Was Denied His Constitutional Right to an Impartial Trial.

The Sixth Amendment to the Constitution of the United States provides that the accused shall enjoy the right to a speedy and impartial trial.

The Fourteenth Amendment provides for due process.

The case at Bar, taken at its entirety, from arrest to the present time, shows a complete denial of these constitutional guarantees.

The defendant was arrested on October 13, 1964 for vagrancy, reviling the police and resisting arrest. He was arraigned that night and tried on December 4th, 1964. In his behalf he introduced in evidence, testimony by the Dean of the Tulane Law School, Cecil Morgan, Professor Lowell Turrentine of the Law School, and Attorney Cuthbert Baldwin of New Orleans. The presiding Judge, Judge Bucaro, then refused to hear any more of the case and over the defendant's objection, continued the case indefinitely.

More than five months later, Judge Bucaro called the case for trial again. The case was heard on May 7th, counsel for the defendant coming from Shreveport, Loui- [fol. 85] siana, to appear. On May 7th, 1965, Judge Bucaro again continued the case to May 14th, 1965, over the strong objection of defendant's counsel. When it was pointed out that the defendant had a final examination at Tulane Law School on May 14th, 1965, Judge Bucaro informed the parties that he was continuing the case in retaliation for the defendant's attitude. When it was pointed out that the defendant's counsel had flown from Shreveport to appear, at considerable expense to the defendant, Judge Bucaro said that he understood that the defendant's father was a prominent attorney in Massachusetts and could therefore afford the added expense.

Thus the case was continued and heard again on May 14, 1965. In order to accommodate the two doctors present

in Court, they were allowed to testify first. Doctor Kohlmann Reed, a Dermatologist from New Orleans, testified in the defendant's behalf that the defendant was his patient, and on the day before his arrest had been examined by Doctor Reed for an unsightly skin disease over his chest and arms and was thereupon placed under treatment by Doctor Reed.

Further testimony was given by Doctor Richard Levy, a New Orleans Orthopedic Surgeon, who treated the defendant upon his release from the police station. He gave evidence of the beating that the defendant underwent while in custody.

After the prosecution rested, the defendant moved for a directed verdict. The Judge took the case under advise-
[fol. 86] ment and the half of the case No. 80503B was held up.

At this time the attorney for the prosecution and Judge Bucaro, decided that new complaints were necessary if the defendant was to be convicted of any crime. Therefore, the City Attorney went downstairs in the Courtroom and drew up the new complaints, in Case No. 83469A for resisting arrest and disturbing the public peace on October 13, 1964. These new complaints were immediately presented to the Court. The defendant objected to this procedure, but to no avail. The defendant was immediately arraigned.

All the witnesses were present necessary to try this case, and therefore the defendant requested an immediate trial, but Judge Bucaro refused to go forward with the trial and continued the case until May 21st, 1965. The case was later continued over the objection of the defendant, to July 16, 1965, for which the defendant had to fly from Massachusetts and his counsel had to come from Shreveport, Louisiana, to New Orleans.

On July 16, 1965, the half of the Case No. 83469A was heard and finished.

The foregoing portrays the atmosphere of the Court, and the attitude of the Judge in his systematic harassment of

the defendant in the trial of the incident of October 13, 1964.

To date Judge Bucaro has refused to decide Case No. 80305B which is an integral part of Case No. 83469A and which contains all the testimony in behalf of the defendant. [fol. 87] It also forms the basis of the defendant's appeal to the Criminal District Court.

By judicial manipulation Judge Bucaro prevented the Criminal District Court from having the complete record of this incident and the case has been decided with only the prosecution's side presented.

The fact that the defendant has been unable to get Judge Bucaro to decide his Motion for Directed Verdict, and therefore unable to get the transcript of Case No. 80503B before the Criminal District Court, denied the defendant his constitutional guarantee of a fair and impartial trial and due process of law.

Wherefore, your petitioner prays that a writ of certiorari issue directing His Honor, Thomas M. Brahney, Jr. Judge, Criminal District Court, Parish of New Orleans, State of Louisiana, to send up to your Honors a record of the case aforesaid, and directing the Municipal Court of New Orleans to send to your Honors the record of Case No. 80305B in order that the same may be assigned by this Court as by the Constitution and law of this State provided, to pronounce judgments thereon which said judgment your petitioner prays shall be a reversal of his conviction for "breach of the public peace."

Stephen R. Wainwright.

[fol. 88]

No. 192-168—Section "D"

Criminal District Court

Parish of Orleans

State of Louisiana

City of New Orleans,

versus

Stephen R. Wainwright.

Notice of Intention to Appeal to the Supreme Court of Louisiana

To the Honorable Thomas M. Brahney, Jr., Justice of the Criminal District Court, Parish of Orleans, State of Louisiana:—

You are hereby notified of the defendant's intention to apply to the Supreme Court of Louisiana for writs of Certiorari, Prohibition and Mandamus from Judgment on March 2nd, 1966, in the above captioned case.

Stephen R. Wainwright, 106 Main Street, Brockton, Massachusetts, Pro Se.

Affidavit of Intention to Appeal (omitted in printing).

[fol. 90] Supreme Court of Louisiana

City of New Orleans, State of Louisiana,

vs.

Stephen R. Wainwright.

Affidavit of Service (omitted in printing).

[fol. 91]

IN THE SUPREME COURT OF LOUISIANA

No. 48,108

CITY OF NEW ORLEANS,

v.

STEPHEN R. WAINWRIGHT.

WRITS REFUSED—March 24, 1966

In re: Stephen R. Wainwright applying for writ of certiorari, prohibition and mandamus.

The application is denied. The ruling of the Criminal District Court for the Parish of Orleans is correct.

WBH, JBF, JBH, FWH, EHMcC, JWS, FWS.

[fol. 92]

SUPREME COURT OF THE UNITED STATES

No. 275—October Term, 1966

STEPHEN R. WAINWRIGHT, Petitioner,

v.

CITY OF NEW ORLEANS, LOUISIANA.

ORDER ALLOWING CERTIORARI—January 9, 1967

The petition herein for a writ of certiorari to the Supreme Court of Louisiana is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JUN 21 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 13 275

STEPHEN R. WAINWRIGHT,
Petitioner,

v.

CITY OF NEW ORLEANS,
STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

STEPHEN R. WAINWRIGHT,
Pro Se,
106 Main Street,
Brockton, Massachusetts.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

STEPHEN R. WAINWRIGHT,
Petitioner,
v.
CITY OF NEW ORLEANS,
STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

Stephen R. Wainwright prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled case on March 24, 1966.

Citations to Opinions Below.

The ruling and judgment of the Criminal District Court, Parish of Orleans, State of Louisiana, are unreported and are printed in Appendix B hereto, *infra*, p. 22.

The opinion of the Supreme Court of Louisiana, printed in Appendix B hereto, *infra*, p. 49, is reported in 184 So. 2d 23.

Jurisdiction.

The judgment of the Municipal Court of New Orleans was rendered on July 16, 1965. A timely appeal was filed in the Criminal District Court, Parish of Orleans, and judgment thereon was rendered on March 2, 1966. A timely application for writs of certiorari, prohibition and mandamus was filed with the Supreme Court of Louisiana on March 15, 1966. This application for writs was denied and the judgment of the Criminal District Court affirmed on March 24, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented.

I.

When a person is stopped on the sidewalk by the police "on suspicion" and questioned, to what extent must the person coöperate? Must he answer all questions? If he has no identification, must he strip to his undershirt on the sidewalk and let the police inspect him for identifying marks, or is this an unreasonable search?

II.

When this person, without identification, is mistaken for a wanted man, and he tells the police his name, address and occupation, but refuses to remove any of his clothing, can he legally be arrested "on suspicion," charged with vagrancy and taken to jail for further investigation, or is this a denial of due process?

III.

When this person arrives in the police station, does he have the right immediately to call his lawyer to prove his identity, or does he first have to submit to the removal of

some of his clothing, to the inspection of his body for identifying marks, and to being booked?

IV.

When this person refuses, because he suffers from an unsightly skin disease, to remove his clothing and submit to this examination for identifying marks, before being allowed to call counsel to prove his identity, and the officers use force to remove his clothing, is this an unreasonable search which the person may resist?

V.

When this person resists the inspection of his body by merely folding his arms across his chest in trying to keep his clothing on, and he is convicted of the crime of disturbing the peace by assault for these actions, is this a denial of due process, in that there was a total lack of evidence of the elements of disturbing the peace by assault?

Statutes.

Code of the City of New Orleans.

Section 42-24. Disturbing Public Peace.

No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another. (C.C.S., Ord. No. 7637, §1; C.C.S., Ord. No. 7809, §1.)

Section 49-1. What Constitutes Resisting an Officer.

Resisting an officer is the intentional opposition, resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving proc-

ess is acting in his official capacity. (C.C.S., Ord. No. 18,142, §1.)

SECTION 49-2. RESISTANCE UNLAWFUL.

It shall be unlawful for any person, by word or action, to resist an officer, or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, §2.)

THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Statement.

On the afternoon of October 12, 1964, the defendant, Stephen R. Wainwright, went to see Doctor W. Kohlmann

Reed, a New Orleans dermatologist, regarding an unsightly skin disease on his arms and chest. He began treatment on that day and was told to return the following week.

Early the following morning, October 13, shortly after midnight, the defendant left his French Quarter apartment and walked down Bourbon Street to go to a diner. Some three blocks from his apartment the defendant was stopped by two police officers in a patrol car. The men, officers Boepple and Ottesen, questioned him on the sidewalk. He told the officers that he was on his way to get something to eat, that his name was Stephen Wainwright, that his address was 829 Ursuline Street, and that he was a student at Tulane University. The police then asked for his identification. The defendant had inadvertently left his identification in his apartment some three blocks away, and he so informed the officers. The defendant was then told to remove his summer jacket so that the officers could make sure that the defendant was not the person they were looking for. The jacket had a zipper front and was tight at the wrists. The defendant, clad only in an undershirt under the jacket, refused to disrobe on the street. The police then tried to talk the defendant into taking his jacket off. The defendant continued to refuse to remove it, but offered instead to go to his apartment to get his identification, and have his roommate, a New Orleans lawyer, identify him. The police declined this idea as contrary to police procedure and insisted that they had a right to examine the defendant on the street for identifying marks. The defendant insisted that they did not have any such right. The disagreement became more heated and the parties argued for some time. Finally the defendant told the police to either let him get his identification or let him go. They refused. The defendant told them to stop molesting him and started to walk away. They

stopped him and at this time ordered him to remove his coat. He refused, so they informed him that he was being placed under arrest. The defendant asked the charge and was informed that he was being placed under arrest for vagrancy by loitering. The officers put the defendant into the patrol car and started for the police station. The defendant asked the police to stop at his apartment on the way, to talk to his lawyer, but they refused, and turned off before they got to Ursuline Street. When the defendant told the police that refusing all his requests was stupid, the officers stopped the car and informed the defendant that they were also charging him with reviling the police. When the car arrived at the station the officers took the defendant inside. The first thing the defendant did was to ask to use the phone to call his lawyer to identify him. This request was summarily denied, and the defendant was placed in an interrogation room with the two arresting officers, Boepple and Ottesen.

Officer John Ottesen: A. When we brought him to the station we brought him into the Interrogation Room; questioned him as to his name, place of birth, etc.

Attorney Dan A. Spencer: Q. Did he answer these questions?

A. He answered his name; where he lived, and said he was a law student. He didn't want to tell us any other information.

Q. Did he ask to use the telephone?

A. I don't know.

Q. You don't recall whether or not he asked you?

A. I don't remember.

Court: He may have?

Officer John Ottesen: It's possible.

Attorney Dan A. Spencer to Officer John Ottesen:
Q. How long was he in the Interrogation Room?
A. Ten or fifteen minutes, and we telephoned for the Lieutenant.
Q. Where was he?
A. Out in the car.

Transcript, p. 36.

Attorney Dan A. Spencer: Q. What happened when Lt. Martello arrived?
Officer John Ottesen: A. The Lieutenant asked him a few questions; he said his name; where he lived; and that he was a law student.

Transcript, p. 37.

Court: Subsequent to the calls to Lt. Martello and the Detectives' office, what did you do, Officer Ottesen?
Officer John Ottesen: Lt. Martello arrived and he questioned Wainwright, and wanted Mr. Wainwright to remove his jacket, because this was a vital incident in his identification, as to whether he was Johnnie McTaylor or not.
Attorney Dan A. Spencer to Officer John Ottesen:
Q. Did you ever search Mr. Wainwright?
A. Yes, when we first interrogated the suspect.
Q. Did he have any weapons on him?
A. No.

Transcript, p. 38.

Lt. Francis Martello: A. I asked him to remove his jacket.
Attorney Dan A. Spencer: Q. This was in the Desk Sergeant's office?
A. Yes.
Q. What did he say then?

A. He demanded the right to use the telephone. He said he wasn't going to remove his jacket. I told him he has a right to use the 'phone. I said all right, we will book you first. He wanted to use the telephone. I told him you have to be booked before you can use the telephone. I told him he had to be searched before he could use the telephone. This is what he objected to.

Transcript, p. 13.

Court: Were you searching for weapons or marks?

Lt. Francis Martello: A. To determine whether or not he had a mark on his arm.

Transcript, p. 15.

Attorney Dan A. Spencer: Q. He did ask to use the telephone before he was searched?

Lt. Francis Martello: A. Yes. I told him no he had to be booked and searched first.

Transcript, p. 16.

The defendant refused to the end to remove his coat, even when assaulted and beaten by the officers.

Attorney Dan A. Spencer: Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

Lt. Francis Martello: A. He tried to keep it on by holding it.

Q. How?

A. By folding his arms. (demonstrates)

Q. He didn't do anything else?

A. No, not to my knowledge.

Transcript, p. 16.

At last the defendant was beaten into submission and the coat ripped from his body. He was booked and charged with vagrancy, reviling the police and resisting arrest, and then he was allowed to call his roommate Attorney Dan Spencer, and told him of his plight. As soon as the defendant hung up the phone the officers took him across the City of New Orleans, and placed him in a basement cell, where he was refused medical attention and where his lawyer could not reach him. When Attorney Spencer arrived at the station to see the defendant, the police informed him that the defendant was not there. The lawyer demanded the right to see his client. The police ordered him from the station. When the young lawyer insisted on seeing the defendant immediately, the police arrested him for vagrancy by refusing to move on.

At 4:30 a.m. the defendant was finally released by the police and immediately went with his lawyer, who had since been released, to a hospital for emergency treatment of his injuries. At 10 p.m. that night the defendant and his lawyer were arraigned and the trial date was set for December 4, 1964. On that date the Municipal Court of New Orleans convicted the defendant's lawyer of vagrancy, which conviction was later reversed on appeal. On that same date, December 4th, the defendant's case, which was originally #80503B, was also begun in Municipal Court before Judge Bucaro, and evidence heard. In his behalf the defendant introduced into evidence testimony by the Dean of the Tulane Law School, Cecil Morgan, Professor Lowell Turrentine of the Law School, and Attorney Cuthbert Baldwin of New Orleans.

Judge Bucaro, however, after learning that the defendant had given a written statement to the New Orleans District Attorney's Office accusing the officers of brutality and false arrest, and that the defendant intended to file a civil action against the officers involved, refused to hear

any more evidence in the case and continued it indefinitely over the objection of the defendant.

No further hearings were held on this case until more than five months later, on May 7, 1965, at which time Judge Bucaro heard only a part of the evidence, and then, over the objection of the defendant, again continued the case, this time to May 14, 1965. These continuances were a hardship to both the defendant and his counsel, since the defendant was in the midst of taking final exams at Tulane Law School and since the defendant's lawyer had to come from Shreveport, Louisiana, for each appearance. Therefore an application for writs of certiorari, prohibition and mandamus was filed in the Criminal District Court, Parish of Orleans, to prevent any further unfounded delays by Judge Bucaro. (See Appendix B, page 22.) The application was denied on May 13, 1965. (See Appendix B, p. 31.)

On May 14, 1965, the case was again heard. In order to accommodate two physicians who were present in court, they were allowed to testify first in behalf of the defendant. Doctor W. Kohlmann Reed, the New Orleans dermatologist who treated the defendant the day before his arrest, explained the defendant's skin disease to the court. Doctor Richard M. Levy testified as to the beating for which he treated the defendant immediately after his release from jail.

At the termination of the government's evidence the defendant moved for a directed verdict. Judge Bucaro took this motion under advisement. The judge then had a short conference with the prosecuting attorney and, as a result of this conversation, more complaints were immediately brought, to wit, resisting arrest and two counts of disturbing the peace. These offenses were alleged to have occurred on the same night as the three others, October 13, 1964, seven months before. #83469A was assigned to this

new element in the case, and the defendant was immediately arraigned. All the witnesses necessary to try this case were present in court, and the defendant therefore insisted on immediate trial of these additional complaints, and insisted that the judge make a decision on his motion for directed verdict with respect to the original charges. Judge Bucaro both refused to decide the motion for directed verdict and refused to hear the complaints, and again continued the case, this time to May 21st. On May 17th, however, the defendant was advised that the case would not be heard on the 21st, but, instead, Judge Bucaro was having it continued again, this time to the 16th day of July, 1965. This continuance, the judge knew, necessitated the defendant's travelling 3,000 miles in order to be present for trial, since he was to graduate in June and return home to Massachusetts.

On July 16, 1965, the parties appeared in court, but Judge Bucaro still refused to take any action on the motion for directed verdict with respect to the first half of the case, to wit, the original complaints of October 13, 1964. He found the defendant guilty of the second half of the case, to wit, the additional complaints which had been brought on May 14, 1965. These convictions were duly appealed to the Criminal District Court for the Parish of Orleans.

A stenographic transcript was made of the hearings on December 4, 1964, May 7, 1965, May 14, 1965, and July 16, 1965. However, the transcript of the evidence taken on December 4, 1964, May 7 and May 14, 1965, was never made a part of the record to be heard on the appeal, although request for the same was duly made by the attorney for the defendant. In the record tendered by the City of New Orleans to the Criminal District Court, only the prosecution's side of the case was presented. That part of the transcript, #80503B, containing all the defendant's wit-

nesses, was not included, so that the Criminal District Court had no opportunity to make a sound decision on the record.

In his assignment of error to the Criminal District Court the defendant argued the following:

ERROR.

The arrest in question was illegal in that there was no evidence of probable cause for the defendant to have been legally arrested for vagrancy or any other crime. (Appendix B, pp. 37, 38.)

RULING.

"Under the circumstances, the arrest was legal. . . . Considering all of the facts and circumstances, the police were justified and had reasonable cause to arrest the defendant." (Appendix B, p. 42.)

ERROR.

There was a total lack of evidence of the defendant's having assaulted a police officer. (Appendix B, p. 38.)

RULING.

"The defendant then folded his arms, and crouched and buffeted the officers in their efforts to remove the jacket." (Appendix B, p. 43.)

ERROR.

The search was unreasonable and the defendant had the right to use such force as might be necessary to resist it. (Appendix B, p. 37.)

RULING.

"For the purpose of identification, the police had a right to examine defendant's arm. . . . To hold that the

police in circumstances such as this cannot make a reasonable search and examination of an individual in lawful police custody, and that an individual can violently oppose the action of the police in doing their duty, would be to unduly hamper the police." (Appendix B, pp. 44-46.)

ERROR.

The defendant was denied his right to counsel. (Appendix B, p. 38.)

RULING.

"Of course the constitutional rights of the individual should be protected, but in our zeal to safeguard those rights, we must not be unmindful of the public interest involved and we should not erect any unnecessary barriers that will thwart the law enforcement officers in the performance of their duties to investigate, detect and secure evidence of crime." (Appendix B, p. 46.)

On March 2, 1966, judgment was rendered by the judge of the Criminal District Court reversing the defendant's convictions of violation of the Code of the City of New Orleans, section 49-2, relative to resisting an officer. (See Appendix A, p. 22.) The conviction was affirmed on the complaints alleging disturbing the peace by assaulting an officer. (See Appendix A, p. 22.)

On March 15, 1966, a timely application for writs was filed in the Supreme Court of Louisiana. The defendant listed therein the following assignment of error (Appendix B, p. 48):

"ASSIGNMENT OF ERROR.

"The defendant assigns as error on the part of the Criminal District Court of the Parish of Orleans, the following, viz:—

"(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

"(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

"(3) The defendant was denied his constitutional right to due process in that:

"(a) The defendant was denied his right to have counsel present from the moment of his arrest.

"(b) The defendant was deprived of his right not to be subject to unlawful search.

"(c) The defendant was deprived of his right to a speedy trial.

"(d) The defendant was deprived of his right to an impartial trial."

On March 24, 1966, the Supreme Court of Louisiana denied the application of writs and affirmed the lower court judgment. (Appendix B, p. 49.)

The crime for which the defendant now stands convicted is violation of section 42-24 of the Code of the City of New Orleans, which provides as follows: "DISTURBING PUBLIC PEACE: No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." (See Appendix A, p. 33.)

The foregoing statements of fact, insofar as they do not appear in the judgment of the Criminal District Court, are a part of the record of the first half of the case in the Municipal Court of the City of New Orleans, #80503B. It will be impossible for this Court to make a full determination of the extent to which the rights of the defendant have been violated without this Court's having the complete record of this case, including the Municipal Court case #80503B. Therefore, the defendant at this time respect-

fully requests that the record in case #80503B, New Orleans Municipal Court, be, by order of this Court, made a part of the record in this case for the purpose of determining this appeal, should this petition for certiorari be granted.

Reasons for Granting the Writ.

I AND II.

Justice William O. Douglas wrote the following for publication in 1960:

> "There is no crime known as 'suspicion' nor is there any federal crime known as 'holding for investigation.' Yet it is common in the District of Columbia, to make arrests for the latter purpose. There were 7,367 persons so arrested in 1958, *all of whom were later released.*" "Vagrancy & Arrest on Suspicion," 70 Yale L.J. 1, 12 (1960).

It is evident from Justice Douglas's article that this practice is not limited to the District of Columbia. Across the United States hundreds of people are arrested "on suspicion" every day in order that they may be investigated further. The District Court of New Orleans acknowledged the practice of its local police department in arresting persons "on suspicion" in an opinion in 1958.

> "It is true that it had formerly been the practice of the New Orleans Police to book suspects on a charge of vagrancy pending investigation of other offenses. It is also true that this practice has been discontinued through the efforts of the Criminal Bar Association of the City of New Orleans." *United States* v. *Sigler*, 162 F. Supp. 256, 259 (1958).

Unfortunately the practice has been discontinued neither in New Orleans nor elsewhere in the United States. The police refuse to discontinue it. They argue that the power to pick up and hold persons for questioning without probable cause to arrest them for a specific crime is a necessary weapon in law enforcement. Justice William O. Douglas disagrees. He says ". . . arrests on suspicion are unconstitutional at the local as well as at the federal level." "Vagrancy and Arrest on Suspicion," 17 Yale L.J. 1, 13 (1960).

Mr. Justice Brandeis dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928), wrote:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (P. 485.) Mr. Justice Clark agreed in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961): "Nothing can destroy a government more quickly than its failure to observe its own laws . . ." (P. 659.)

The law here is clear. The Supreme Court has forbidden such restraints, except in conformity with the Fourth Amendment requirement of probable cause. *Henry* v. *United States,* 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959). *Brinegar* v. *United States,* 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949). *Carroll* v. *United States,* 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925). However, in *Rios* v. *United States,* 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960), the government urged that the Court give explicit recognition to the right of police to stop and

question suspects, without their consent, in the absence of grounds for an arrest. The Court disposed of the case on other grounds.

The *Rios* question is before the Court again in this case, and doubtless, if it is not decided now, it will be a recurrent visitor in the light of the statistics of Mr. Justice Douglas, *supra*. Therefore your petitioner prays that this petition for a writ of certiorari be granted.

III.

In 1964, Mr. Justice Goldberg wrote:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright* . . ." *Escobedo* v. *Illinois*, 378 U.S. 478, at pp. 490-491, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964).

In the case at bar the defendant had been arrested on suspicion of murder and charged with vagrancy. The investigation had clearly focused on him and he was placed in an interrogation room and questioned by the police. He requested and was denied counsel and was never warned of his absolute constitutional right to remain silent. There-

fore under the holding in *Escobedo* v. *Illinois, supra,* the defendant was clearly denied his right of counsel.

But what can a person do when counsel is denied? *Escobedo* v. *Illinois, supra,* only decided that the police could not use in court any evidence procured in this manner. The question to be answered now is: After counsel is denied, does the defendant have to submit to any further demands by the police, especially the removal of his clothing and the inspection of his skin? Does the denial of counsel vitiate the arrest itself? A holding that it does is the logical next step from *Escobedo* v. *Illinois,* and your petitioner prays that this Court grant certiorari and take that step.

IV.

Whether the removal of the defendant's clothing and the examination of his skin in order to determine his identity was an unreasonable search depends on whether "probable cause" existed at the time of the arrest and search. In order to satisfy this burden, the State must prove that the officers had probable cause to believe both that Johnny McTaylor was a murderer and that the defendant was Johnny McTaylor. No evidence was ever introduced as to the probable cause to believe Johnny McTaylor to be a murderer. Furthermore, the reasons why the police thought the defendant to be Johnny McTaylor are insufficient to make out probable cause.

> "To afford a justification, there must be not only a real belief, and reasonable grounds, for it . . . but, where there is an opportunity for inquiry and investigation, inquiry and investigation should be made. . . . [The officer] was bound to use all reasonable means to avoid possible mistake, and the arrest of an innocent

> man. . . . He was not justified in relying upon a personal resemblance, as indicated by a comparison with a photograph . . . especially as there was, within easy reach, means of identification." *Filer* v. *Smith,* 96 Mich. 347, 354, 55 N.W. 999, 1001, 1002 (1893).

This means of identification, within easy reach, was the telephone. But the police refused to let the defendant use it to call his lawyer and prove his identity. Neither did they use it themselves. Instead of making a reasonable investigation, the police chose instead to determine whether or not the defendant was Johnny McTaylor by the simple expedient of ripping off his clothes. Police tactics such as these are a recognized part of big-city law enforcement, although such tactics are never openly approved. Nevertheless, the State courts have condoned them by accepting their fruits and relegating their victims to a civil action against the offending officers later on.

This Court recognized the plight of these victims in *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949). It slowed the practice in *Rochin* v. *California,* 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952). And in *Mapp* v. *Ohio, supra,* it effectively stopped the use of the fruits of an illegal search in court. Now the Court is asked to clarify what a person can do when the police try to force him to submit to an illegal search. Therefore your petitioner prays that this Court grant certiorari, make a clear and definite ruling, and stem these abuses.

V.

In *Garner* v. *Louisiana,* 368 U.S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961), the Court held that it was a denial of due process for the defendant to be convicted of disturbing the peace where there was a total lack of evidence of the

commission of the crime. In the case at bar there is the same total lack of evidence. The officers testified that the defendant never struck out at them but that he merely held on to his clothing. In fact, the officers never felt they had even been assaulted on October 13, 1964. It was not until May 14, 1965, after they had conferred with Judge Bucaro and the prosecuting attorney, in open court, that the officers decided that they had been assaulted back on October 13, 1964. It was not until May 14, 1965, that any complaints for assault were ever brought against the defendant.

The lengths to which Judge Bucaro has gone to protect the officers involved in this case, and to keep this case from being heard in full, are a credit to his determination to be re-elected to the Municipal Court judgeship which he now holds. He continued the case without cause four times, from December 4, 1964, to July 16, 1965, and succeeded in having the case split in half so that any appeal would of necessity be only piecemeal. He has still refused to decide the first half of the case, involving the charges of vagrancy, reviling the police and resisting arrest, thus effectively preventing that half of the case from either being appealed or its transcript being used as evidence. In short, Judge Bucaro has denied the defendant any semblance of a speedy and impartial trial.

New Orleans is a city where the people truly fear the police, and where the police department is all powerful. The defendant went against this untrammelled New Orleans police power on the street and was arrested. He stood up against it again in the police station, and was choked, beaten, kneed in the groin and knocked to the floor. He fought it in the opposition's lair in Municipal Court, and lost. He appealed against it in the Criminal District Court and lost again. He sought review of it in the Supreme Court of Louisiana and they looked the other way.

Now the defendant is at the door of the Court of Last Resort.

Now it is with this Court alone to overturn this unfounded conviction; it is with this Court alone to halt the police practice of stopping and questioning persons "on suspicion" without their consent in the absence of probable cause to arrest them.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN R. WAINWRIGHT,
Pro Se.

[Appendix follows.]

Appendix A.

Statutes.

(See pages 3-4, *supra.*)

Appendix B.

Rulings, Opinions and Judgments below.

Number 189-939 "E"

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE SECOND MUNICIPAL COURT, CITY OF NEW ORLEANS, STATE OF LOUISIANA, IN THE CASE ENTITLED:

B-80503

CITY OF NEW ORLEANS,
STATE OF LOUISIANA

vs.

STEPHEN R. WAINWRIGHT

Dan A. Spencer
3420 Greenwood Road
Shreveport, Louisiana
Attorney for Stephen R. Wainwright

TO THE HONORABLE THE JUDGES OF THE CRIMINAL DISTRICT COURT OF THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The petition of Stephen Reed Wainwright, defendant in a case entitled "City of New Orleans vs. Stephen Reed Wainwright, No. B-80503 on the Docket of the Second

Municipal Court of the City of New Orleans, respectfully shows:

Statement of the Case

The defendant is charged in three affidavits with violations of municipal ordinances of the City of New Orleans, being ordinances Nos. 828 MCS, Sections 49-2, relative to resisting arrest, 42-85:3, relative to loitering and 49-7, relative to reviling the police. It is alleged in the affidavits that the defendant violated the said ordinances on Tuesday, the 13th day of October, 1964.

On December 4, 1964, the trial of this case was begun and two witnesses were heard. The witnesses testified to the character of the defendant and the fact that he was and had been on the date of the alleged offense a student in the School of Law at Tulane University. Following the testimony of the two character witnesses, the court ordered the trial of this matter continued indefinitely, over the strenuous objection of counsel for defendant. Sometime in the month of April, 1965, subpoenas were issued to the defendant and his attorney ordering the continuance of the trial herein. The trial was set to resume on the 7th day of May, 1965.

At the commencement of the trial a number of witnesses for whom subpoenas had been requested by the defendant were not present in open court. The court refused to issue attachments for these witnesses although it did see fit to sequester the Dean of the Tulane University School of Law, a prospective character witness for the defendant, putting him in a private office, by himself. Following the swearing of one of the city's witnesses, and some testimony by him, the case was thereupon continued to the 14th day of May, 1965, once more over the strenuous objections of counsel for defendant.

During the course of the testimony at the trial on the 7th day of May, 1965, the defendant was forced to stand at attention before the dock and threatened by Judge Andrew Bucaro, the Judge of the said court, with being placed in jail for contempt if he moved.

In continuing the case to the 14th day of May the Judge stated that he was doing so in retaliation for the defendant's having turned around while standing before the dock. He further stated that the fact that counsel for defendant was from Shreveport and would be forced to return again to the City of New Orleans to resume the trial made no difference, as he (the Judge) "understood that the defendant's father was a successful attorney and could afford counsel's fee". He further stated that the fact that the defendant would be in the midst of taking final exams in the Tulane Law School at the time of the trial would make no difference. The case was continued.

Ground on Which the Supervisory Jurisdiction of This Court is Invoked.

Petitioner shows that no appeal lies from the judgments and actions complained of and further shows that he will suffer irrevocable injury as a result of these judgments and actions unless remedial writs are granted by this Honorable Court for the following reasons:

The Issues

This case is a prosecution by the City of New Orleans for the violation of municipal ordinances. The issues and questions of law involved are:

1. Whether the continuance of this case from time to time over a period of five months for the obvious reason of imposing summary punishment on the defendant constitutes a violation of the defendant's constitutional rights

to a fair and impartial and speedy trial and due process of law.

2. Whether the forcing of the defendant, who is partially incapacitated by duodenal ulcers and a back injury, to stand at attention before the dock of the court in such a manner as to impose summary punishment constitutes a violation of his constitutional immunity from cruel and unusual punishments and his right to due process of law and to be presumed innocent until proven guilty.

3. Whether a trial Judge may intimidate a defendant and his counsel with threats to hold the defendant in contempt of court for actions which would not, in the eyes of reasonable men, imply any lack of respect for the court.

4. Whether the defendant may be constitutionally deprived of his right to compulsory process for the attendance of witnesses in his favor.

Assignment of Errors

1. The court erred in continuing the trial for a period of over five months.

2. The court erred in continuing the trial on May 7, 1965, as a means of retaliation against the imagined lack of respect of the defendant for the court.

3. The court erred in continuing the trial on May 7, 1965, as a means of imposing summary punishment on the defendant without due process of law.

4. The court erred in failing to issue instanter subpoenas or attachments for absent witnesses subpoenaed by the defendant.

5. The court erred in forcing the defendant, who is not in good health, to stand at attention before the dock of the court, this being a medieval practice long since discarded by the courts of this country.

6. The court erred in attempting to intimidate defendant and his counsel with threats of jailing defendant for contempt.

Argument on Assignment of Errors

This proceeding in the municipal court in the City of New Orleans constitutes a flagrant and shameful travesty of justice. From the time of defendant's arrest in this case, his rights have been totally ignored. After being brutally and unjustifiably beaten by the New Orleans Police Department, defendant was denied the right to confer with his counsel or obtain medical assistance for a period of several hours. When his attorney attempted to see him shortly after his arrest, the attorney was ordered from the police station, arrested for refusing to leave it without seeing his client, and jailed.

On the evening on which defendant was arraigned in the municipal court, undersigned counsel, the same attorney who was arrested by the police on the previous night, was informed by one Judge of the Municipal Court that in any case before that court in which the complainant was a policeman, there would be a conviction whether the defendant be an attorney, a priest or of impeccable character and despite any testimony of the defendant's innocence. The Judge gave as a reason that he and the other Judges of the Municipal Court could not be re-elected without the support of the New Orleans Police Department and that, consequently, the Judges of that court must, of necessity, support the policemen, whether they were right or wrong. When defendant's attorney went to trial on the charges against him in the Municipal Court, he was asked to attend the chambers of the presiding Judge. He was there given cause to believe that unless he dropped any action he might be contemplating against the policemen involved, he would be convicted. When he refused

to drop the action against the policemen, he was convicted on a record devoid of any evidence of guilt. Attempts were made by the Judge and the City Attorney to prevent him from taking an appeal. Immediately prior to the commencement of that trial, the presiding Judge had been visited in his office by the superintendent of Police, who was a witness in the case, and both the defendant and his associate counsel were denied the right to be present at the conference.

An appeal was ultimately perfected to this Honorable Court, being Case No. 188-368 of Section E of this Court. The Honorable Rudolph F. Becker, Jr. acquitted undersigned counsel of any wrongdoing in that case.

Counsel has been informed by the City Attorney's office that in any case before the Municipal Court, it is the duty of the City Attorney, as much to protect policemen from possible civil actions as it is to obtain convictions of guilty persons.

The foregoing recitation has been provided to give the court the background on this case and the environment in which it has been conducted. This can hardly be said to have been a fair and impartial trial to date.

The errors of the trial Judge set out above constitute, in the opinion of counsel, an attempt to summarily punish the defendant for charges he has made against members of the New Orleans Police Department. The expenses of defense in this case, exclusive of attorney's fees, will nearly exceed the maximum fine which could be imposed upon the defendant should he be found guilty. It would seem that justice in the City of New Orleans places a much higher cost on proving ones' innocence than in pleading guilty to totally unfounded and unwarranted charges, at least in the Municipal Court.

Unless this Honorable Court grants the writs here applied for, the defendant will be further unjustly damaged

in the Municipal Court. He will be forced to stand at attention, possibly for hours, before the dock of the court. He will be forced, while in the midst of his final exams in his last semester of law school to come again and again to the municipal court, there to be unfairly abused with threats of jail for any slight movement. His attorney will be forced, one knows not how many more times, to journey from Shreveport to New Orleans to hear perhaps half the testimony of one witness, if that, on each trip. The defendant could hardly obtain new counsel in the middle of the trial. Defendant will be deprived of his right to obtain witnesses in his favor by the refusal of the trial court to issue subpoenas.

WHEREFORE, petitioner prays that his application for remedial writs be filed in this Honorable Court and that writs of Certiorari, Prohibition and Mandamus issue herein ordering and commanding the Judge of the Second Municipal Court of the City of New Orleans to send forthwith the original records of the above case to this court for reviewing of the judgments and actions of the said Judge of the Second Municipal Court and prohibit the said Judge from proceeding further in this case and the respondent from prosecuting it further until the judgment be pronounced herein on the regularity of these proceedings. That the aforesaid Judge of the Second Municipal Court and the respondent, the City Attorney, be ordered to show cause in this court at a day and hour to be fixed by the court, why the Honorable Andrew Bucaro, Judge of the Second Municipal Court, should not be ordered:

1. To commence immediately and within twenty-four (24) hours the trial of this case and the taking of evidence therein and to proceed from minute to minute and hour to hour until such time as all of the evidenee has been heard and judgment rendered.

2. To cease and desist from having the defendant stand at attention at the dock of the court and to allow him to be seated during the course of the trial.

3. To cease and desist from threatening either defendant, or his counsel, with holding them in contempt unless it should be necessary to do so to maintain order in the court room.

4. To issue instanter subpoenas or attachments for any witnesses for whom subpoenas were requested by defendant or his counsel and who were not present in court at the commencement of the trial.

DAN A. SPENCER
Dan A. Spencer
Attorney for Petitioner
3420 Greenwood Road
Shreveport, Louisiana

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

Section.....
Number.....

CITY OF NEW ORLEANS *vs.* STEPHEN R. WAINWRIGHT

In re: Stephen R. Wainwright, applying for writs of Certiorari, Prohibition and Mandamus:

The petition of the realtor in the above entitled and numbered cause, having been duly considered;

It is ordered that a writ of Certiorari issue herein, directing the Honorable Andrew Bucaro, Judge of the Second Municipal Court of the City of New Orleans to transmit to the Criminal District Court for the Parish of Orleans on or before the.....day of....., 1965, the record, or a certified copy of the record, of the proceedings complained of by the realtor herein, to the end that the validity of said proceedings may be ascertained.

It is further ordered that the aforesaid Judge of said court and the respondent, City Attorney of the Municipal Court, show cause, in this court, on the date aforesaid at.....o'clock..... M., why the relief prayed for in the petition of the realtor should not be granted.

It is further ordered that the aforesaid Judge be and he is hereby enjoined from proceeding further in this case until judgment shall be pronounced on the regularity of his proceeding.

Granted at New Orleans, Louisiana,....., 1965.

.....

Judge

STATE OF LOUISIANA;
PARISH OF CADDO:

DAN A. SPENCER, being duly sworn, deposed and said that he is Attorney for the petitioner in the above and foregoing application for remedial Writs of Certiorari, Prohibition and Mandamus; that all of the facts set forth therein are true and correct; that a copy of the application has been mailed to the City Attorney, postage prepaid and a copy has been mailed to the respondent Judge of the Second Municipal Court, Honorable Andrew [Bucaro], postage prepaid.

DAN A. SPENCER
Dan A. Spencer

Sworn to and subscribed before me, this 10th day of May, 1965.

E. E. BLAND JR.
Notary Public

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 189-939
SECTION "E"

CITY OF NEW ORLEANS,
STATE OF LOUISIANA
vs.
STEPHEN R. WAINWRIGHT

Application for Writs of Certiorari, Prohibition and Mandamus to the Second Municipal Court, City of New Orleans, State of Louisiana.

Writs refused.

New Orleans, Louisiana, this 13th day of May, 1965.

RUDOLPH F. BECKER, JR.
Rudolph F. Becker, Jr.
Judge, Section "E"
Criminal District Court
Parish of Orleans

Clerk's Office May 14 1965
A true copy.
DAN B. HAGGERTY
Deputy Clerk,
Criminal District Court,
Parish of Orleans.

APPEAL TO
CRIMINAL DISTRICT COURT

STATE OF LOUISIANA
CITY OF NEW ORLEANS
v.
STEPHEN R. WAINWRIGHT
DEFENDANT-APPELLANT

APPEAL FROM
FIRST MUNICIPAL COURT
CITY OF NEW ORLEANS
HONORABLE JUDGE ANDREW G. BUCARO

ORIGINAL BRIEF OF DEFENDANT-APPELLANT ON APPEAL

by Dan A. Spencer
Attorney at Law
Attorney for Defendant

MAY IT PLEASE THE COURT: This is an appeal from a conviction of the defendant by the First Municipal Court of the City of New Orleans. The defendant finds it necessary at the outset to object to the record transmitted to this Court from the Municipal Court. The record as transcribed is inaccurate and incomplete. It omits certain questions and the answers thereto by the witnesses. It is entirely devoid of any of the grounds stated by counsel for the defendant in support of objections and motions made during the course of the trial. The testimony which is omitted is not crucial and if this Honorable Court finds that the defendant can supply here all the legal grounds for objections and motions which are reflected in the record, then the defendant is willing to have his appeal decided on the record as transmitted. If not, the defendant must insist upon his right to an appeal on the entire record of the trial in the lower court. La. R. S. 13:2498

Statement of Case

The defendant is charged with the violation of two ordinances, which for the convenience of the court, will be set out here in full. Section 49-2 of the Code of the City of New Orleans provides:

> "SECTION 49-2. RESISTANCE UNLAWFUL.
>
> It shall be unlawful for any person, by word or action, to resist an officer, or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer." (C.C.S., Ord. No. 18, 142, § 2.)

Section 42-24 of the Code of the City of New Orleans provides:

> "SECTION 42-24. DISTURBING PUBLIC PEACE.
>
> No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." (C.C.S., Ord. No. 7637, § 1.; Ord. No. 7809, § 1.)

Two police officers testified on behalf of the City. They testified that while on duty at the First District Police Station on the night of October 13, 1964, the presence of the defendant, Mr. Wainwright, was brought to their attention and that they *were told by other officers* that Mr. Wainwright had been arrested. Neither of them disclosed what charges, if any, had been made against Mr. Wainwright.

Lt. Martello, the police officer who had been in command at the police station, testified that he ordered the defendant to take off his jacket so that he could search him and determine what, if any, identifying marks Mr. Wainwright had on his body. He testified that, when Mr. Wainwright refused to take his jacket off, he ordered several other

police officers to take it off of him. Martello stated that the defendant's only action while the police officers attempted to remove the jacket was to fold his arms and hold them together. He also testified that the defendant had been interrogated in the police station prior to this incident and, although, he had requested to be allowed to use the telephone, that he was refused this right until after he had had his clothing torn from him.

Patrolman O'Rourke's testimony added nothing to the City's case except that the defendant had, while they were attempting to remove his jacket, attempted to pull away from them, and they were bounced about some. At the conclusion of these officers' testimony, the defendant made a motion for a directed verdict, which was denied. Mr. Wainwright, who had graduated from Tulane University Law School since the incident and who had come from his home in Massachusetts for this trial, was convicted on all counts.

Assignment of Error

The defendant assigns the following as error on the part of the trial judge in his judgment of the case:

1.

Section 49-2 of the Code of the City of New Orleans is unconstitutional in that it is so vague as not to apprise a person of the prohibited conduct.

2.

There is absolutely no evidence of all of the elements of the offenses of resisting an officer.

3.

There is no evidence whatsoever of the defendant having assaulted a police officer.

Argument on Assignment of Error

Section 49-2 of the Code of the City of New Orleans is unconstitutionally vague. This section of the City Code, standing alone, apprises no one of just what conduct is prohibited. What kind of officer does it refer to and to whom resistance is made unlawful? Is it any public officer, any corporate officer, or any military officer? When is resistance to this officer unlawful? When the officer is acting in his official capacity, at any time, and even when the officer is exceeding his authority? This ordinance could be construed so broadly that any dispute with a public official could subject one to conviction of the crime. As an attorney of law, the writer is an officer of this court. Resistance to him could even be construed as criminal conduct under this ordinance. Under the Jurisprudence of this State as it is set out in the cases of State v. Cristine, 239 La. 259, 118 So. 2d 403; State v. Truby, 211 La. 178, 29 So. 2d 758; and State v. Gardner, 151 La. 874, 92 So. 368, this ordinance must be held unconstitutionally vague. In the latter case, the Court quoted with approval the following words from U.S. v. Reese, 92 U.S. 214, 23 L. Ed. 563;

> "Every man should be able to know with certainty when he is committing a crime. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

The Supreme Court must surely have had a law of the type the court here faces in mind when making that statement.

Section 49-1 of the Code of the City of New Orleans contains a definition of the crime of resisting an officer. It is no part of the record of this case, it is not cited in the affidavit against the defendant, and when counsel for the

defendant argued on his motion for a directed verdict, that the conduct of the defendant did not meet that definition, his motion was overruled by the trial judge. No reason was given. I must therefore assume that the city agrees that it is not before this court, and that it does not rely on that section as forming any part of the case against the defendant.

There is however, no way to be sure of this and for this reason the defense must now reurge contentions made below, that the defendant's conduct did not come within the definition in Section 49-1. Section 49-1 of the Code of the City of New Orleans provides:

> "SECTION 49-1. WHAT CONSTITUTES RESISTING AN OFFICER.
>
> Resisting an officer is the intentional opposition, resistence to, or obstruction of, an individual acting in his official capacity and authorized by law to make lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity." (C.C.S., Ord. No. 18, 142, § 1.)

There is no evidence, and there has been no contention by the City, that Officers Martello and O'Rourke were arresting the defendant, seizing his property, or serving any lawful process or court order. A person can be guilty of the crime defined in Section 49-1 only when he resists an officer *in the process of making a lawful arrest, seizure of property or service of any lawful process or court order.* Criminal statutes are construed strictly and all ambiguities therein should be construed in the accused's favor, State v. Christine, Supra, and authorities cited therein.

If there is one single thing clear in the record of this case it is that the defendant was not being arrested by Officers Martello or O'Rourke, and this being the case Section 49-1 would not cover the conduct of the defendant. The prosecution witnesses stated only that they were told that the defendant *had been* arrested. Nowhere in the record, prior to defendant's motion for a directed verdict, is there any competent or legal evidence that the defendant had been arrested, and there is not even a suggestion that he was being arrested *at the time of the alleged resistance.* Neither is there any evidence of probable cause for him to have been arrested. Under the strict interpretation which must be given a criminal statute, the City must be found to have failed to meet the burden of proving every element of the offense of resisting an officer, if, contrary to our contention Section 49-1 can be considered by this Court as forming part of the charge against the defendant.

The only laws of this State, or of the City of New Orleans, which might apply to resistance to an officer having custody of a prisoner, are those having to do with escape, and those include as a necessary element of the crime, that the accused be in the "lawful custody" of the State. The conduct of a prisoner in police custody is governed by the administrative rules and regulations of the authority which holds him. State v. Daniels, 326 La. 998, 109 So. 2d 896, at page 906.

There is nothing in the record to show that the defendant was in the legal custody of the New Orleans Police Department. There is only the testimony of the police officers that they were told that the defendant had been arrested. The legality of the arrest must be shown in order to find the defendant guilty of any crime in resisting it. Wright v. State of Georgia, 183 S. Ct. 1240, 373 U.S. 284, 10 L. Ed. 349; Cit of Monroe v. Ducas, 203 La. 974, 14 So. 2d 781. One may always resist an illegal arrest

and may use such force as may be necessary, Wright v. State of Georgia, Supra, and City of Monroe v. Ducas, Supra. It is respectfully submitted that even if the City had shown that the defendant had been legally arrested, that the ordinance in question would be inapplicable to the facts of this case since the ordinance prohibits only resistance *during* the arrest and does not apply to the action of a prisoner of the police who is being detained for interrogation or confinement. To hold otherwise is to extend the ordinance to a situation not clearly covered by it.

It is further submitted that the City offered no competent evidence that the defendant *was ever legally arrested* and the existence of a *legal* arrest would be a necessary element of the crime in question which would have to be proved like every other element of a crime. City of Monroe v. Ducas, Supra; Wright v. State of Georgia, Supra. If the defendant had, in fact, been legally arrested it was incumbent on the City to show this, and, the evidence being solely under its control, the City's failure to produce it must be construed against it.

There is the additional factor of the police refusal to allow the defendant to contact his attorney. This was a clear violation of Louisiana Law. It rendered the continued detention of the prisoner illegal, if it was not from it's inception. Does one held incommunicado have an obligation to cooperate with the police? I contend that he does not and that this violation of his constitutional and statutory right gave the defendant the same right of resistance one has to an unlawful arrest. City of Monroe v. Ducas, Supra.

The conviction of the defendant on the charges of assaulting two police officers, is, to say the least, preposterous. If this Court construes the testimony of the two police officers in the light most favorable to the City, it can only find that the defendant tried to hold his arms

together and was yanked from side to side by the police officers. Officer Martello admitted that the defendant did not strike out at the officers, and onl tried to hold his jacket on. This is not an assault. There is no evidence at all indicating an attempt by the defendant to harm these officers. Resistance of the type attributed to the defendant surely does not constitute the crime of assault.

This case forms part of a seemingly interminable series of attempts by certain officials of the City of New Orleans to whitewash the acts of two members of the New Orleans Police Force. Twice before, the facts out of which this case grew have been before this Court.

In City of New Orleans, v. Dan A. Spencer, case no. 188,368 on the docket of this Court, your Honors were presented with the appeal of this defendant's attorney, the undersigned writer, from his conviction for having attempted to contact Mr. Wainwright on the night of his alleged arrest. The charges in that case were for refusal to leave the police station without being allowed to see his client and for reviling the two police officers who refused to allow him to see his client. The record in that case amply demonstrates the devious and contemptible manner in which some public officials in this City would use the judicial process to effect their own ends. The judgment of the Court, the Honorable Rudolph F. Becker, Jr. presiding, was that the defendant had violated no law and had been within his rights in being present at the police station, and that there was no evidence of his having reviled any police officer.

Chapter two of this shameful travesty can be found in case no. 189,939 on the docket of this Court. In that case Stephen R. Wainwright, the defendant herein, was faced with other charges growing out of the same incident. That case was before this Court on an application for writs by the defendant, wherein he sought to have the Second Mu-

nicipal Court, the *Honorable Andrew G. Bucaro* presiding, ordered to continue with the trial of the case. The case had been continued on a number of occasions over a period of five months, being partially tried at each setting. In that case Wainwright was charged with *vagrancy,* resisting arrest, and reviling the police on the night of *October 13, 1964.* The writs were refused in that case. Since the refusal of the writs further testimony has been taken and although the defendant traveled seventeen hundred (1700) miles from his home in Massachusetts, where he was preparing to take the Massachusetts Bar Examination, the case has once again been indefinitely continued, Judge Bucaro refusing to continue further.

It is interesting to note in this connection that it was shortly after the application for writs in that case, in May of this year, that the new charges which are before the Court here were instituted against the defendant. Specifically, these charges against the defendant were filed on May 13, 1965, for the alleged crimes which took place on October 13, 1964.

Counsel for the defendant, several times during the trial of this case requested to be allowed to introduce the entire record in the other case against the defendant, into evidence in this case. This is just one of the omissions in the record hereinabove referred to. This case has dragged on for so long that the defendant only wishes to see it concluded. Counsel feels that the record in this case adequately demonstrates the defendants innocence and therefore will rely on the record of the facts as transmitted, supplying in this brief the legal ground on which he relies.

Conclusion

The only just one would be a judgment of acquittal.

by DAN A. SPENCER
Attorney for Defendant

CITY OF NEW ORLEANS
versus
STEPHEN R. WAINWRIGHT

No. 192-168—SECTION "D"
CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

APPEAL FROM FIRST MUNICIPAL COURT
CITY OF NEW ORLEANS

JUDGMENT

This is an appeal by the appellant, Stephen R. Wainwright, from the judgment of the First Municipal Court of the City of New Orleans.

The defendant, Stephen R. Wainwright, was convicted in First Municipal Court of violation of Ordinance No. 828 M.C.S. Section 49-2 relative to resisting an officer and violation of Ordinance No. 828 MCC.S. Section 42-24 relative to disturbing the peace. He was found guilty and given a $25.00 fine on each charge which sentences were suspended and the defendant timely filed his appeal.

Counsel for defendant has urged several grounds for reversal of the convictions, which shall be considered, but at the outset this Court is of the opinion that the defendant was under arrest at the time the incidents, which form the basis of these charges, occurred.

The defendant was stopped and questioned by the arresting officers because, in their opinion, he fitted the description of a subject wanted for the crime of murder. The officers had been furnished a composite drawing of the wanted subject and had been requested to search the vicinity of the French Quarter. When the defendant was stopped in the French Quarter he was informed that he fitted the description of the wanted subject and that the wanted subject had a tatoo on his left forearm "born to raise hell". The defendant had no identification on him when he was stopped and he refused to remove his jacket for the purpose of iden-

tification. The defendant was belligerent and attempted to walk off on three different occasions and appeared to be using subterfuge to evade the matter. He refused to answer any questions except his name and that he was a law student. He would not tell his place of birth or give any other information. The officers then arrested him, placed him in a police car and took the defendant to the First District Station.

Under the circumstances, the arrest was legal. Louisiana Revised Statutes 15:60 provides that any peace officer without a warrant may arrest a person:

(3) When a felony has been committed and he has reasonable cause to believe that such person committed it.

"Almost without exception when the fact of felony is known to the police before arrest the courts have found the second prong i.e. the identity of the felon also to have been established. Stated factually, the cases hold that if the police learn from the victim, from their fellow officers, from their own observation at the scene of the crime or from reliable informants that a felony has in fact been committed, the courts require *little more toward identifying the felon to warrant* arrest and search. Bare description, presence near the scene of the felony, suspicious or furtive conduct, any evidence of this nature has been held to constitute probable cause to establish the identity of the felon." (People vs. Estrialgo 37 Misc. (2) 264, 233 N.Y. S 2nd 558.)

Considering all of the facts and circumstances the police were justified and had reasonable cause to arrest the defendant. The Court feels that this entire episode could have been avoided if the defendant had merely revealed his arm, disclosing no tattoo marks and had attempted to be more cooperative.

When the defendant was brought to the First District Station the facts concerning the arrest were brought to the attention of Lieutenant Martello, the superior of the arresting officers.

Lieutenant Martello attempted to question the defendant and he refused any information. Lieutenant Martello asked him to remove his jacket prior to being booked for identification purposes and to reveal any possible concealed weapon. The defendant at this time advised the officer if he wanted the jacket off, he would have to take it off. Lieutenant Martello instructed Officer O'Rourke and Officer Gilford to remove the defendant's jacket. The defendant then folded his arms and crouched and buffeted the officers in their efforts to remove the jacket. The conduct of the defendant was so violent that it was necessary to summon the assistance of a third officer, namely Officer Kent before his jacket could be removed.

The conduct of the defendant at this time was not resisting an officer within the definition and since criminal statutes must be strictly construed, the Court finds the defendant not guilty of resisting an officer. I have been unable to find any authorities as when the resisting arrest must occur. Arrest necessarily involves more than the original physical detention and it could be argued logically that arrest covers the transporting to the station, and booking and fingerprinting but since criminal statutes must be strictly construed in favor of the defendant, I hold that the conduct of the defendant was not, technically, resisting within the wording of the ordinances for the reason that the definition of Resisting an Officer must be read together with the offense of resisting an officer, and one limits the other.

The Chief of Police and the officers, under his direction, have the responsibility of, first, maintaining the security of the District Stations and, secondly, to furnish informa-

tion relative to arrested and suspected persons' name, fingerprints, photographs and identification to the Department of State Police, R.S. 15:581 et sequituir. The defendant was in police custody pursuant to a legal arrest and the officers had the right and the obligation to search the defendant for any concealed weapons, even though the defendant had been previously "frisked" for weapons on the street. This second search before locking up is more detailed because it has to cover not only obvious weapons but anything that may be used as a weapon or means of escape or injury to anyone. It is a matter of common knowledge that belts and ties are always taken from defendants before lockup to protect them as much as anyone else.

For the purpose of identification the police had a right to examine defendant's arm. If perchance the defendant had been the wanted subject and this forceful examination had disclosed his identity, evidence of such an identifying mark could have been testified to. Further, in many jurisdictions the defendant could have been compelled to exhibit his arm at the trial of the matter.

> "Generally, it is not considered to be a violation of the privileges against self incrimination to compel one who is accused or suspected of a crime to perform an act outside the court and not in the presence of the jury and to allow a witness to testify as to the act. This has been explained as arising from the fact that the privilege is intended to protect the defendant as a witness and when such an act is performed outside of court, the evidence thereof comes from witnesses other than the defendant and therefore does not violate his privilege. Furthermore, it has been said that this is as much to exonerate the accused as it is to identify him as the perpetrator of the crime. Thus, a suspect

has been required to try on garments such as a hat or a coat, to put a handkerchief over part of his face, to appear in a police lineup, to submit to a physical examination of his body, to submit to having his fingerprints or footprints taken, to assume certain poses, to be photographed, to speak for voice identification, and to surrender his shoes for the purpose of permitting them to be compared with tracks near the place where the crime was committed.". 21 Am. Jur. 2nd. P. 368.

"Even in a courtroom during a trial a defendant may be required to stand and remove a visor so that witnesses attempting to identify him (or presumptively exonerate him) may have an unobstructed view of his features." People vs. Clark, 18 Cal. 2nd. 448—116 P. 2nd 56.

In People vs. Lopez 384 P. 2nd. 16 the defendant was convicted of murder and objected to being forced to appear in a lineup and appealed. The Court, in denying the appeal, stated:

"Showups are a part of the investigation procedure and often result in the release of a suspect. The showup exposes subjects to view for purposes of identification or elimination but not incrimination." See also State vs. Hughes 154 So. 2nd 395—244 La. 774.

In the instant case the examination of the defendant by the police exonerated him of the charge or suspicion of murder. There is no evidence the police used unnecessary force in removing the defendant's jacket but, on the contrary, the testimony of the officer was to the effect that they tried to avoid being hurt by the defendant or hurting him, but that he bounced them from wall to wall. To hold that the police in circumstances such as this cannot make a

reasonable search and examination of an individual in lawful police custody and that an individual can violently oppose the action of police in doing their duty, would be to unduly hamper the police.

> "The steady increase in the number of serious crimes throughout the United States is a matter of grave concern. Of course the constitutional rights of the individual should be protected. But in our zeal to safeguard those rights we must not be unmindful of the public interest involved and we should not erect any unnecessary barriers that will thwart the law enforcement officers in the performance of their duties to investigate detect and secure evidence of crime."

Hollingsworth vs. U. S. 321 F. 2nd. 342.

In State vs. Hughes 154 So. 2nd 395, 244 La. 774, objection was made to the introduction of photographs of the accused and the testimony of the coroner as to his examination of the accused, which were overruled. In affirming the trial court, the Supreme Court stated:

> "We do not think that permitting the coroner to testify as to his findings upon the physical examination made of the accused or the admission in evidence of pictures of the accused denied him due process of law simply because the examination was made and the pictures were taken while he was in custody of the police and without counsel. We know of no provision of the law which requires the consent of the person arrested and charged with a crime for these things to be done. Neither the testimony of the coroner nor the admission in evidence of the pictures violated defendant's constitutional privileges against compulsory self-incrimination. Underhill's Criminal Evi-

dence (5th ed. 1956) P. 239, sec. 126. State vs. Roy 220 La. 1017, 58 So. 2d. 323. State vs. Robinson 221 La. 19, 58 So. 2nd 408. Counsel does not say that the admission of the testimony and of the pictures was contrary to any rule of evidence or violated any statute or law of this state, and we do not think the facts and circumstances show that any constitutional right of the accused was violated."

Can it be successfully urged that a suspect or defendant cannot be physically forced to appear in a lineup; physically forced to submit to fingerprint and photograph; physically forced to submit to physical examination when the force used is not excessive and only such force is used as is necessary to overcome the resistance of the defendant. I think not. To hold otherwise would thwart the police in their normal investigative procedure.

The judgment of the trial court and the sentence as to the verdict of guilty on the two charges of Disturbing the Peace, is affirmed.

New Orleans, Louisiana, March 2nd, 1966.

/s/ Thos. M. Brahney, Jr.
Thos. M. Brahney, Jr., Judge,
Section "D"
Criminal District Court
Parish of Orleans
State of Louisiana

New Orleans, La., May 16, 1966
A true copy
M. J. Boyle Minute Clerk.
Criminal District Court,
Section "D" Parish of Orleans.

SUPREME COURT OF LOUISIANA

APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO CRIMINAL DISTRICT COURT OF THE PARISH OF ORLEANS, STATE OF LOUISIANA, IN THE CASE ENTITLED:

City of New Orleans
State of Louisiana
vs.
Stephen R. Wainwright

#192-168, Section D
Criminal District Court
Parish of Orleans
State of Louisiana

Stephen R. Wainwright, Pro Se
106 Main Street
Brockton, Massachusetts

ASSIGNMENT OF ERROR

The defendant assigns as error on the part of the Criminal District Court of the Parish of Orleans, the following, viz:—

(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

(3) The defendant was denied his constitutional right to due process in that:

(a) The defendant was denied his right to have counsel present from the moment of his arrest.

(b) The defendant was deprived of his right not to be subject to unlawful search.

(c) The defendant was deprived of his right to a speedy trial.

(d) The defendant was deprived of his right to an impartial trial.

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

No. 48,108 March 24, 1966

CITY OF NEW ORLEANS
v.
STEPHEN R. WAINWRIGHT

In re: Stephen R. Wainwright applying for writ of certiorari, prohibition and mandamus

The application is denied. The ruling of the Criminal District Court for the Parish of Orleans is correct.

/s/ WBH
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ JWS
/s/ FWS

A true copy
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 24, 1966
HAROLD A. MOISE
Deputy Clerk

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Supreme Court of the United States

1967

No. ~~275~~ 13

STEPHEN R. WAINWRIGHT,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

RESPONSE OF THE CITY OF NEW ORLEANS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

ALVIN J. LISKA,
City Attorney,

RICHARD C. SEITHER,
Assistant City Attorney,
City Prosecutor,

Attorneys for Respondent,
Room 2W23 — City Hall,
New Orleans, Louisiana.

HAUSER-AMERICAN, "LEGAL PRINTERS", 441 GRAVIER STREET, NEW ORLEANS, LA.

INDEX

(A three-page summary of the City's Response herein.)

1. No name-calling Response in kind intended.
   But Defendant-Appellant-Petitioner Wainwright and his Attorney, Dan A. Spencer, display so obvious an inability to deal with facts they, and their presentation of the record in this matter, are UNWORTHY OF BELIEF. (This is the City's basic answer, and proof of its validity runs throughout this Response brief.)
   Pages 1-30

2. Opinions of the Courts below are correct as reported, but serious record omissions noted.
   Pages 3-6

3. Proof that Defendant-Appellant-Petitioner accepted record as transmitted from Municipal Court; letters, Petitioner's petition say so.
   Pages 4-6

4. The ordinances involved.
   Pages 6-7

5. City of New Orleans has long embraced Justice Douglas' views on "Vagrancy and Arrest on Suspicion;" 1957 police orders forbidding arrest and booking on "Vagrancy pending investigation of another offense" offered as proof.
   Pages 7-11 and Pages 16-18

6. Wainwright's Questions presented for Review not grounded in fact.
   Page 11

7. Wainwright's facts, Wainwright's law.
   Page 11

8. Appellate record is appellant's responsibility to perfect, and is matter between appellant and clerk of court.
   Certainly prosecution has no burden to perfect defendant's appellate record which is designed to overthrow a conviction of defendant that prosecution has already obtained. Prosecution cannot possibly be shouldered with responsibility of reversing itself in hard-earned verdict it has already won and wants to maintain.
   Pages 13-15 and Pages 29-30

INDEX—(Continued)

9. Wainwright convicted only of assaulting police officers; no other matters properly before this court. Page 16

10. Details at arrest scene reviewed; in light of Wainwright's suspicious behavior there, please consider the alternative. Pages 16-19

11. Defendant's Attorney Spencer never arrested, booked, charged or tried for vagraney.
Just another untruthful "error" which a mere reporting of the record could and should have avoided; another flagrant example of Petitioner's irresponsibility, unworthiness of belief. Page 19

12. No unlawful search of Petitioner Wainwright. Page 20

13. No denial of counsel. Pages 21-24

14. What "brutal beating"? Pages 24-28

15. And no absence of probable cause. Page 18

16. All these are reasons why there can be no application here of the law and authorities Wainwright cites—to which law the City of New Orleans subscribes and which it respects and follows. Pages 23-24 and Pages 7-11

17. Conclusion and Prayer. Pages 29-30

18. Certificate. Page 30

INDEX—(Continued)

APPENDICES

Appendix A. Opposition by the City of New Orleans to Defendant-Appellant Wainwright's application to the Supreme Court of Louisiana for Writs of Certiorari, Prohibition and Mandamus to the Criminal District Court for the Parish of Orleans, State of Louisiana.

Pages 31-43

Appendix B. Transcript of the trial of Stephen R. Wainwright on charges of Disturbing the Peace by Assault on Patrolman George O'Rourke and on Patrolman Frank Gilford, under Affidavit No. 83469-A.

Pages 45-82

Appendix C. Statement by both Wainwright and his Attorney, Dan A. Spencer, confirming that Wainwright had phoned Spencer from the police station within a half-hour after Wainwright had left the apartment shared by Wainwright and Spencer. (Offered in support of City's insistence there was no denial of counsel.)

Pages 83-87.

Appendix D. Transcript of the trial of Dan A. Spencer on charges of reviling police and refusing to move on, under Affidavit No. C-80504.

Pages 89-127

Appendix E. Transcript of the varied proceedings on four different dates under Affidavit No. B-80503, which contains three concrete but long-abandoned charges against Stephen R. Wainwright for resisting arrest, vagrancy by loitering and reviling the police (NOT for suspicion of anything).

Pages 129-180

Supreme Court of the United States

No. 275

STEPHEN R. WAINWRIGHT,

Petitioner,

versus

CITY OF NEW ORLEANS,

Respondent.

RESPONSE OF THE CITY OF NEW ORLEANS IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

The City of New Orleans herewith submits its response in opposition to the issuance of a writ of certiorari to the Supreme Court of Louisiana.

NO RESPONSE IN KIND INTENDED

There is considerable name-calling directed at the City of New Orleans, her police officers, her judges and her City Attorneys in the petitions and briefs filed in this voluminous record by Defendant - Appellant - Attorney Stephen R. Wainwright and his one-time Attorney, Dan A. Spencer, (e.g. — calling the Municipal Court proceedings "this shameful travesty;" accusations that certain judges declared they had to rule with the police because they depended upon police support for their election and hoped-for reelection; and the like.)

Despite this, the City of New Orleans has no intention of answering in kind.

This response heavily points up the remarkable inability of Wainwright and Spencer to report facts, their complete disregard for proving or even attempting to prove allegations and accusations of the most damaging nature.

The City does this only because it must do this to turn back what the City considers an outrageously unfounded attack on a City which was performing only its basic police function of trying to solve murder — a City which believes that its primary responsibility is to protect its citizens in their person and property.

A City, indeed, which believes that citizen's right to be protected in his person and property easily primes all other of that citizen's rights, including even his precious rights against self-incrimination (5th Amendment), unlawful search and seizure (4th Amendment), right to counsel (6th Amendment), freedom of speech (1st Amendment), and other equally essential rights.

The City insists that *none* of Wainwright's constitutional guarantees, rights or privileges were denied him in any phase of this case.

The City insists its police department, its attorneys and its judges all performed only their duty — and did it capably and well.

All this litigation — which has attained ridiculous proportions — could have been avoided by the simple expedient of Wainwright merely baring his left forearm.

The City does not consider it unreasonable to ask The Supreme Court of the United States to rule that

THIS SLIGHT INCONVENIENCE TO WAINWRIGHT SHOULD YIELD TO THE GREATER PUBLIC NEED FOR SOLVING MURDER IN THE COMMUNITY.

The incidence of murder — and the influx of malcontents, recalcitrants, and irresponsible troublemakers — have reached record highs in New Orleans.

OPINIONS OF THE COURTS BELOW

The opinions of the Criminal District Court Parish of Orleans and of the Supreme Court of Louisiana, as presented by the Petitioner in his Appendix B, are correct.

But there is omitted by Mr. Wainwright two other parts of the Criminal District Court record, which shows that the Honorable Thos. M. Brahney, Jr., Judge of Section "D" of the said Criminal District Court wrote Wainwright's attorney, Dan A. Spencer, that "I am unable to take any action in this matter until you advise me whether or not the record, which I have in my court, is complete and accurate and that you wish to proceed on the record as is.", and Spencer's answering letter informing Judge Brahney, "we will stand on the record as transcribed." (Here are copies of both letters.):

November 17, 1965.

Mr. Dan A. Spencer,
Attorney at Law,
3420 Greenwood Road,
Shreveport, Louisiana #71109.

Re: City of New Orleans versus Stephen R. Wainwright, No. 192-168

Dear Mr. Spencer:

This morning I located your brief which you referred to in your letter, in case #189-939. From the first paragraph of your brief I am unable to take any action in this matter until you advise me whether or not the record, which I have in my court, is complete and accurate and that you wish to proceed on the record as is. If the record is not complete and accurate then, you take whatever steps you deem necessary to see that it is made complete and accurate. I must admit that I am confused by the opening paragraph of your brief and, until you clarify it further for me, I will not take any further action in this matter.

For your information, the matter was argued briefly by the City this morning; however, because of these later developments I will continue this matter as an open case until I hear from you further.

Very truly yours,

THOS. M. BRAHNEY, JR.

TB:TS

Clerk's Office 3-8 1966

A TRUE COPY
L. Altobello, Deputy Clerk,
Criminal District Court,
Parish of Orleans

DAN A. SPENCER
Attorney and Counselor at Law

Telephone
631-7469

3420 Greenwood Road
Shreveport, Louisiana
71109

November 17, 1965

Judge Thomas M. Brahney, Jr.
Criminal District Court
Section "D"
Parish of Orleans
New Orleans 19, Louisiana

Re: City of New Orleans v. Stephen R. Wainwright, No. 192-168

Dear Judge Brahney:

Thank you for your letter of November 17, 1965. My objection to the record is primarily based on the failure of the reporter to include therein my argument on the law in making certain objections and motions during the course of the trial.

It is my understanding that legal objections to a trial in Municipal Court may be supplied on appeal in the Criminal District Court. Judge Becker has previously informed me that it is not necessary to reserve bills of exception in the Municipal Court in order to preserve errors for the appeal.

I believe there are in this case errors patent on the face of this record. These are, I believe, fully covered in my brief. If your appreciation of the law is in accordance with mine, i e, that it is not necessary to reserve bills of exception, or to have the record show the legal grounds argued in support of objections and motions, we will stand on the record as transcribed.

Thank you for taking the trouble to write me about this matter. I am, with kindest regards

Yours very truly,

/s/ DAN A. SPENCER
Dan A. Spencer

DAS/jcd

Clerk's Office 3-8 1966

A TRUE COPY
L. Altobello, Deputy Clerk,
Criminal District Court,
Parish of Orleans

Wainwright also failed to include in his appellate record the City's answer to defendant's application to the Louisiana Supreme Court for writs. And the City stresses it is Wainwright's failure (not the City's) because it is HIS appellate record and HIS obligation to perfect it.

Of course, it could have been another oversight on the part of Mr. Wainwright, but this omission deprives the record of sacramental points of law on which the highest court of this State ruled in this case.

It is most respectfully submitted that Wainwright's failure to request rehearing or perfect any bills of exception before going to the Supreme Court of Louisiana was, in itself, enough to prevent the Louisiana Supreme Court from ruling any way other than it did.

The City's answer to Wainwright's application to the Supreme Court of Louisiana is something that Wainwright should have had in his Petition to the Supreme Court of the United States, so it is made part of the record herein. (Appendix A.).

It is placed early in this Response, because a reading of it at the outset might well resolve this case and dispense with any need to read the rest of this voluminous record.

THE ORDINANCES INVOLVED

The ordinances — Sections 42-24, 49-1 and 49-2 are correct as presented by the Petitioner; however only Section

42-24 is before this Honorable Court because the Municipal Court conviction of Stephen R. Wainwright under Section 49-2 — resisting an officer — was reversed in the Criminal District Court, Parish of Orleans (full copy of that judgment is in your Wainwright petition) and that reversal was upheld by the Louisiana Supreme Court. So that the only matter before the United States Supreme Court, the City of New Orleans respectfully submits, is the conviction of Stephen R. Wainwright for assaulting the officers of the New Orleans Police Department. (The City is making part of this response brief a complete transcript of the trial of Wainwright for those assaults. See Appendix B.)

MR. JUSTICE DOUGLAS AND THE SIGLER CASE FAVOR THE CITY OF NEW ORLEANS AND NOT MR. WAINWRIGHT

Not since 1958 have there been any arrests on suspicion in New Orleans.

Not since 1958 have there been instances of persons booked for vagrancy pending investigation of another offense.

Witness the following orders from the Superintendent of Police, and kindly note their dates.

DEPARTMENT OF POLICE
INTEROFFICE CORRESPONDENCE

TO: ALL BUREAUS, DISTRICTS AND DIVISIONS DATE: AUG. 8th, 1957

FROM:

SUBJECT: DEPUTY SUPERINTENDENT JOS. I. GIARRUSSO

R.S. 14:107

Effective immediately, members of this Department will discontinue using R.S. 14:107, Vagrancy, as a holding charge.

It is the opinion of the District Attorney's Office that if an officer has sufficient evidence to arrest a suspect that he has enough evidence to place a direct charge in connection with the crime under investigation. The fact that a further investigation is being conducted may be indicated by placing the words "under investigation" in pencil on the arrest book. This will be eradicated when such investigation is completed, or the prisoner is bonded or paroled.

It must be understood that the District Attorney's Office is not bound to accept as final, the charge which is made on the arrest book. The Criminal District Court affidavit, as filed, may accuse a person of a greater crime or a lesser crime than the one on which the subject was arrested. Only the facts, as submitted in a report to the District Attorney's Office, will guide the action in the acceptance of a specific charge.

R.S. 14:107 Vagrancy will be used if the facts warrant such a charge under one of the sections of this statute. The wording "pending investigation" will not be used in connection with such a charge. This article is not intended to be used indiscriminately. It is for use only when it can be supported by facts.

PROVOSTY A. DAYRIES,
Superintendent of Police

BY: JOSEPH I. GIARRUSSO,
Deputy Superintendent

PAD:JIG/b
NOPD
FORM #105

DEPARTMENT OF POLICE
INTEROFFICE CORRESPONDENCE

TO: ALL BUREAUS, DISTRICTS & DIVISIONS DATE 8/14/57

FROM: DEPUTY SUPERINTENDENT JOS. I. GIARRUSSO

SUBJECT: R. S. 14:107

On August 9, 1957, an inter office correspondence was sent out explaining the use of R.S. 14:107 "pending investigation."

The last sentence of the second paragraph of this correspondence reads: "This will be eradicated when such investigation is completed, or the prisoner is bonded or paroled." It has been brought to my attention that this sentence requires some clarification.

As you know there can be no erasures on an arrest book. Therefore, when the investigation is completed, or the prisoner is bonded or paroled, you will place a red line through the notation "under investigation". The last sentence of the second paragraph of my August 9, correspondence should read:

"This will be red-lined when such investigation is completed, or the prisoner is bonded or paroled."

The officer who red lines the words "under investigation" will place his initials on the arrest book, along with the time and date the investigation was completed.

PROVOSTY A. DAYRIES
Superintendent of Police.

BY: JOSEPH I. GIARRUSSO
Deputy Superintendent.

JIG/t

NOPD
FORM #105

When Wainwright cites *U. S. v. Sigler*, 162 F. Supp. 256 (1958), and "Vagrancy and Arrest on Suspicion," Douglas, Justice William O., 70 Yale L. J. 1 (1960), he cites law favorable to the City of New Orleans, not to himself. The City has long embraced Justice Douglas' views in this area and rejected, as far back as 1957, the practice of arresting on suspicion, and the practice of arresting or booking on "Vagrancy pending investigation of Other Offenses."

The marked variance between Wainwright and the City is that Wainwright — irresponsibly and WITHOUT PROOF — accuses the City of New Orleans of continuing the practice, and the City offers concrete proof that the practice was discontinued by written order of the Police Superintendent in 1957.

QUESTIONS PRESENTED FOR REVIEW

The questions raised in this matter are all questions of fact rather than law and the City of New Orleans must deny, categorically and specifically, the allegations contained in Petitioner's five questions as being simply and grossly untrue.

The City submits that if the facts are accepted by this Honorable Supreme Court of the United States as Petitioner-Attorney Wainwright presents them in his five questions, there is no point in offering opposition. But, the fact is that these questions as presented by Petitioner-Attorney Wainwright are gross distortions and just not true.

WAINWRIGHT'S FACTS, WAINWRIGHT'S LAW

The City of New Orleans respectfully submits that the assertions and allegations Defendant-Attorney-Appellant Stephen R. Wainwright and his attorney, Dan A. Spencer, have stated as facts in this record, are reckless, irresponsible, most often mere mouthings totally unsupported by proof, or offer of proof, and — to state the City's position bluntly — **UNWORTHY OF BELIEF.** They were found unworthy of belief by one grand jury, a police bureau of investigation, the district attorney's office of Jim Garrison, and three courts, including the Supreme Court of Louisiana.

THE LAW Wainwright cites is, for the most part, good law with which the City has no quarrel because it is the law which the City follows to the letter. The only point of contention the City offers in this area is that far too much of the law Wainwright cites has no place in this case because he seeks to apply it to alleged happenings that just did not happen. For instance:

Of course, Wainwright's convictions should be reversed if The Supreme Court of the United States is willing to accept **WITHOUT PROOF** Wainwright's statement he was stopped by two New Orleans policemen and ordered "to take off his clothes" on Bourbon Street (Wainwright variously reports this as "ordered to disrobe" and "ordered to strip to my waist.")

Of course, the City should be reversed if it denied Wainwright his right to counsel. But it just isn't so, and the City proves it shortly.

Of course, the City should be reversed if members of her Police Department administered "a brutal beating" to Wainwright. But Wainwright has had over two years

now to offer some proof, some medical evidence, and he has not.

REGARDING INCOMPLETE APPELLATE RECORD

Of course, the City should be reversed if it resorted to so dastardly an act as to fail to complete Wainwright's appellate record. But in Wainwright's Petition for Writs, which Your Honors have had before you since June of this year, there is stated at Page 32, "The testimony which is omitted is not crucial and * * * the defendant is willing to have his appeal decided on the record as transmitted."

And on Page 40 of that same Petition for Writs (concluding paragraph) there is stated: "Counsel feels that the record in this case adequately demonstrates the defendant's innocence and therefore will rely on the record of the facts as transmitted, supplying in this brief the legal ground on which he relies."

Despite this, Judge Brahney wrote Wainwright's attorney, Spencer, on this point **before** ever deciding Wainwright's first appeal, and Your Honors have already seen in this response the letters of Judge Brahney and Attorney Spencer.

Nonetheless, Wainwright raises the same point about incompleteness of the record before the Supreme Court of the United States, and the City of New Orleans is ordered to incur this staggering expense of completing the appellant's record.

The City of New Orleans believes this is patently unfair and respectfully calls upon the Supreme Court of the United States to order Defendant-Appellant Wainwright to pay this staggering bill.

As far back as 1920, the Supreme Court of Louisiana placed the burden of perfecting the defendant's appeal squarely on the defendant-appellant, where it belongs. *State v. Morgan*, (1920), 147 La. 205, 84 So. 589, certiorari denied 40 S. Ct. 588, 253 U.S. 498, 64 L. Ed. 1032.

> "As appellant, obligation rested upon defendant to bring his appeal properly before the court and not by means of an imperfect transcript."

In *State v. Lee*, (1906) 116 La. 607, 40 So. 914, it was held: "The state as appellee in a criminal prosecution is not responsible for defects in the transcripts on appeal."

Yet in this Wainwright case, although Wainwright and Spencer had agreed "to have his appeal decided on the record as transmitted"— and BOTH Wainwright and the United States Supreme Court **KNEW** or **SHOULD HAVE KNOWN** this because it's part of Wainwright's Petition for Writs — Wainwright re-urges before the nation's highest court the incompleteness of an appellate record he had already acquiesced in!

As a result, the City of New Orleans has complied with a Court Order of the Supreme Court of the United States — as the City of New Orleans always does — and sends up in this Response records and parts of records in trials for reviling police, resisting an officer, and vagrancy (Appendix D and Appendix E) because Wainwright and Spencer urged (with success up here) that they formed part of an entirely separate trial and convictions for Disturbing the Peace by assaulting police officers. The cases had separate affidavit numbers, separate allotments, separate trials on separate charges and were tried on different dates.

The City believes Wainwright should bear the expenses for completing his appellate brief, as he would have had to

do in Louisiana and which he avoided by accepting the record as transmitted in Louisiana.

Whether done by design or not, Wainwright certainly should not be allowed to waive his FINANCIAL RESPONSIBILITY of completing his appellate record in Louisiana and then seek to place this staggering financial and time-consuming burden on the City of New Orleans by unwaiving before the United States Supreme Court his earlier acceptance of that record.

To get the various transcripts into his appellate record at the time District Court Judge Brahney called his hand on it, Wainwright would have had to pay so much a page — as Wainwright well knew because there is in this record correspondence from the Clerk of the Municipal Court stating the costs, etc., (which see). So he saved those costs by accepting the record as transcribed, failed to bring up any question about incompleteness of his appellate record before the Louisiana Supreme Court where he would still be burdened with the same schedule of transcribing fees, but raised the point before the United States Supreme Court, blaming the City.

Can it be that he could possibly achieve an avoidance of paying these fees in this manner and calling upon the nation's highest court to support him in this?

The City of New Orleans cannot entertain such a belief, and calls upon the Supreme Court of the United States to order that Wainwright pay the high cost of this Response, particularly of the many and varied transcripts the City has been ordered to send up to Washington.

WAINWRIGHT'S CONVICTIONS WERE ONLY ON ASSAULTING POLICE OFFICERS AND NO OTHER MATTERS ARE PROPERLY BEFORE THIS COURT

The City respectfully reminds This Honorable Court that Stephen R. Wainwright was convicted of butting police officers around from wall to wall, not by "merely folding his arms across his chest," as Wainwright puts it. (Please see court testimony, Appendix B, and weigh it against Wainwright's reckless assertions in brief, where he doesn't have to face assistant city attorneys, cross-examination, or confront witnesses against him.)

NO ARRESTS ON SUSPICION; NO BOOKINGS ON VAGRANCY PENDING INVESTIGATION OF ANOTHER OFFENSE

Some of Wainwright's allegations are their own best evidence of his complete irresponsibility. The City cannot insult the intelligence of this nation's highest tribunal by suggesting The Supreme Court would heed for a moment Wainwright's grossly unsupported assertions regarding arrests "on suspicion" and booking of "suspects on a charge of vagrancy pending investigation of other offenses," to-wit:

> "Unfortunately, the practice has been discontinued neither in New Orleans nor elsewhere in the United States. The police refuse to discontinue it." (Pages 15 and 16 of Wainwright's Petition.)

The City asks: How can Wainwright know these things? He's wrong about New Orleans, where the practice was stopped in 1957, and how can Wainwright account for "elsewhere in the United States," wherever that is? Does he purport to speak knowledgeably about this practice for the 50 states?

Relying sacramentally on the legal fundament that he who alleges must prove, the City calls upon the Supreme Court to ask Wainwright for a list of any persons the New Orleans Police Department has arrested on suspicion, or booked for vagrancy pending investigation of other offenses, since 1958.

Now the die is cast. This transcends opinion. It is either a fact or not a fact that persons are arrested in New Orleans on suspicion. It is either a fact or not a fact that persons are booked in New Orleans on charges of vagrancy pending investigation of crime. The City of New Orleans adamantly says **NO.** Wainwright says **YES.** The City should not be called upon to prove the negative. Wainwright should be called upon to prove his most damaging and untrue charges.

If Wainwright cannot produce such a list — and he cannot — then let him produce the record of any **ONE** person arrested in New Orleans on suspicion; and/or of any **ONE** person booked in New Orleans since 1958 on vagrancy pending investigation of other offenses.

The City submits this is of the gravest importance in this case because Wainwright relies on these totally unsupported accusations to establish what he lists on Pages 15 and 16 as Reasons I and II for Granting the Writs of Certiorari he seeks herein. Yet Wainwright, steadfast in his irresponsibility, persists on Page 16:

> "They argue that the power to pick up and hold persons for questioning without probable cause to arrest them for a specific crime is a necessary weapon in law enforcement."

The City asks: Who is the ubiquitous "they" Wainwright is talking about? He's not talking about New Or-

leans police in general (although he believes he is — without proof). And he's not talking about New Orleans police specifically in this case because Officers Boepple and Ottesen had as their probable cause for questioning Wainwright the fact that he fit the description of Johnny Mac Taylor, a subject wanted for murder. And, by all evidence, the officers told Wainwright this at the Bourbon Street scene.

MOST IMPORTANTLY, they also told Wainwright that Johnny Mac Taylor had a tattoo, "Born to raise Hell", on his left forearm and a mere showing of his left forearm would have ended the matter right there, as Judge Brahney found in his opinion printed in Wainwright's Petition and as arresting officers testified in one of the herein transcripts.

Yet, when Wainwright, acting like a petulant child, refused to display his left forearm on Bourbon Street, the police did not then place him under arrest as a suspect in murder. The police explained that the idea of the left forearm inspection was simply to **clear** Wainwright of suspicion, not to incriminate him. And Wainwright **never** was arrested on suspicion of anything. It was at least five minutes or more later before Wainwright was arrested for resisting an officer and vagrancy by loitering because he had no identification on him, no draft card although he's of draft age, and because he THRICE walked away, or tried to walk away, from police when they were questioning him.

PLEASE CONSIDER THE ALTERNATIVE.

Under the immediately preceding set of facts, could the police officers have been expected to just let Wainwright walk away from the questioning?

If so, what happens to law enforcement in the United States?

And to police responsibility to investigate murder in the community?

SPENCER NEVER FACED VAGRANCY CHARGES

When Mr. Wainwright says, as he does on Page 9 of his petition, that Spencer was convicted of vagrancy, this is a MOST SERIOUS error, for these reasons:

(1) Spencer was convicted in the lower court of reviling the police and refusing to move on. Spencer was never, ever booked, charged with, tried, or convicted of vagrancy.

(2) Now these are matters not of opinion but of sheer fact which anybody could have ascertained by merely checking the record and which Wainwright should have ascertained before going up to this highest court of the land.

(3) These are matters which transcend opinion. They are facts which can be easily proved or disproved, like whether or not New Orleans still arrests on suspicion and still book people with vagrancy pending investigation of some offense.

(4) In the light of the importance Wainwright attaches to his unfounded accusations that New Orleans Police arrest on suspicion and BOOK WITH VAGRANCY PENDING INVESTIGATION OF ANOTHER OFFENSE, Wainwright's completely erroneous and irresponsible statement, as a fact, that Spencer was convicted of vagraney may not be so innocent a mistake as it might appear at first blush.

NO UNLAWFUL SEARCH OF WAINWRIGHT

There was never an unreasonable search of Wainwright. When, at the Bourbon Street scene, Wainwright refused to cooperate with the police in their investigation of a capital offense in this City, neither police officer tried to subject him to any unreasonable search.

Wainwright had his jacket taken off of him in the District Station some ten or 15 minutes later when he refused to submit to what is a normal ordinary routine part of police procedure, that of having every arrestee in any station remove his belt, his tie, his jacket, etc. The reason for this is solid police procedure, which is followed so far as we know by good policemen throughout the nation. Its justification is to prevent arrestees from self-inflicting harm, which they can achieve of course, by hanging themselves with the belt or tie, or by having some weapon such as a knife or file stashed away in said jacket. But Wainwright conveniently leaves out of his brief the facts that at the District Station he folded his arms and told the police officers involved that if they wanted his jacket taken off of him they would have to take it off, and then according to the uncontroverted evidence presented in a Court of law in front of Mr. Wainwright and in front of Mr. Wainwright's defense attorney, Dan A. Spencer, Wainwright then proceeded to butt several of the officers from wall to wall. (A copy of the transcript of this case is annexed to and made part of this brief, Appendix B.)

Again, the City respectfully asks the Supreme Court of the United States to weigh the facts as related by Wainwright when he is writing a brief against the facts as handled by Wainwright and his defense attorney when faced by them contradictorily in a courtroom.

WAINWRIGHT WAS NEVER DENIED RIGHT TO COUNSEL AND COUNSEL WAS NEVER DENIED RIGHT TO WAINWRIGHT

Regarding Wainwright's allegations of denial of counsel, the usual pattern of contemptuous disregard for accuracy and truth is present. In support of this very strong statement by the City against both Wainwright and his attorney, the City offers the following evidence (please note: the City herein states it is offering **EVIDENCE**, not irresponsible mouthings):

1. Statements by both Wainwright and Spencer declaring that Wainwright had phoned Spencer from the police station within a half-hour after Wainwright had left the apartment shared by Wainwright and Spencer. (See Appendix C.)

Considering Wainwright had walked, by his own statement, some four blocks from home, experienced the considerable questioning at the Bourbon Street scene, the ride to the police station, the interrogation there, the "brutal beating" (also unsubstantiated in this Supreme Court or any other record by any medical evidence, even though Wainwright has had more than two years in which to furnish some), then the "disrobing", and the "illegal search" of his person, and, finally, the booking (only on Disturbing the Peace by Assaulting the police officers, and on Resisting an Officer — NOT on suspicion of anything, and **NOT** on vagrancy pending investigation of anything) — considering all these events, one half-hour's time does not strongly support Wainwright's allegation of denial of counsel.

2. The transcript of the trial of Spencer on the charges of reviling police and refusing to move on is made

part of this record (Appendix D) so it can establish, to anyone's satisfaction, that Attorney Dan A. Spencer **NEVER DID** identify himself to the police as anything other than Wainwright's "roommate and friend," never did reveal himself to be an attorney, displayed a remarkable ignorance of how to get anyone paroled or admitted to bail (matters any attorney would be expected to know), asserted repeated lack of cooperation from police officers who explained how he could get Wainwright bonded or paroled, then called an officer "that smart lieutenant" and generally abused the police until they asked him to leave. When he refused, he was arrested for reviling the police and refusing to move on (NOT for vagrancy, as Wainwright states in his petition, Page 9).

Now, the City of New Orleans does not ask anyone to accept this on argument alone; the City asks merely that one read the annexed transcript of the entire trial of Dan Arthur Spencer (annexed hereto, Affidavit No. C-80504) and judge for oneself — as a matter of fact, nothing else.

The City reasserts that, from the facts available in the transcript — facts that went uncontroverted IN THE COURTROOM by either Wainwright or Spencer — it is evident, AS MATTERS OF SHEER FACT, that Attorney Spencer deliberately concealed from the police his identity as an attorney and then alleged he was denied right to his client.

When police officers swore, under oath, that Spencer did not identify himself to them as an attorney, Spencer, face-to-face contradictorily with these officers, did NOT refute their claims, did NOT cross-examine them on this sacramental point, did not put into the record — when in a courtroom where his own veracity could have been challenged — any statement or evidence that he had ever identi-

fied himself to the police as an attorney or indeed as anything other than Wainwright's "roommate and friend."

What did Spencer do when confronted with these allegations in the courtroom?

(1). He tried to keep such testimony out of the record.

(2) He argued it is irrelevant and immaterial whether or not Spencer identified himself as an attorney.

(3) He finally — in a pitiable display of dismay and frustration — asked the trial court to take judicial cognizance that Spencer was an attorney on the date in question and that he represented Wainwright on that date. In this pathetic move, he attempted to prove by judicial notice what he could easily and properly have established by his own direct testimony or by cross-examination of the witnesses who confronted him. (Please check all these points in the annexed transcript of No. C-80504 in Appendix D.)

Despite all this, Wainwright persists in alleging denial of counsel. Do you believe Wainwright isn't familiar with Spencer's trial?

The most serious danger here, as City Prosecutor Seither pointed out in the various Louisiana forums, is that any attorney could deliberately conceal his identity as an attorney, provoke his own arrest, and then have ruled out of evidence any statements his client might make on the grounds his client was denied counsel and counsel was denied access to his client.

As a matter of fact, neither was denied access to each other in this case.

As a matter of law, this is precisely the spot in this response to argue that the authorities cited by Wainwright avail him nothing in this case at bar.

Escobedo is about denial of counsel, and Wainwright was not denied counsel, neither at the police station nor at any of the trials or other courtroom proceedings. *Mapp* and *Rios* are about search, and search does not enter into this case; Wainwright was convicted of assaulting police officers in a police station — there are no other cases before Your Honors in this appeal — and his conviction on assault was not based in the slightest on any evidence unlawfully seized nor on any statements made by Wainwright. (Wainwright was too busy telling everybody else what his rights were for him to seriously allege at this point that he was denied any rights through his ignorance of the law.)

Escobedo has always been the law in Louisiana.

Statements have never been admitted into evidence without a prior foundation established for their introduction. In laying that predicate, prosecutors have always had to establish that the statement was made or obtained entirely freely and voluntarily, that there was exerted no force, duress, threats, promises of immunity from prosecution, and the like, in return for the statements. And certainly, if defendant were denied access to counsel, that alone has repeatedly been held in Louisiana to be sufficient to rule out any statements made by that defendant. (Perhaps Mr. Wainwright will elect to dispute this and, if he does, it should be a simple thing for him to come in with cases showing the contrary — if he can find any.)

WHAT "BRUTAL BEATING"?

Wainwright alleges he was "brutally beaten" but comes in with no medical statement to even attempt to substantiate this untruthful claim.

He states, variously, that he was kneed in the groin and, rather indelicately, "in the balls" — which, if sub-

stantiated, can be pretty damaging kneeing.

But where is there the slightest scintilla of evidence to support this claim?

Wainwright has yet to produce any proof, or offer of proof.

One supposes he relies solely upon the testimony (contained in Appendix E, the transcript of abandoned proceedings in Affidavit B-80503) of Doctors Kohlman Reed and Richard M. Levy.

Dr. Reed testifies only to his findings in an examination — conducted BEFORE Wainwright was involved in the Bourbon Street arrest,— for what Wainwright calls an unsightly skin disease. Dr. Reed doesn't appear to agree it's so unsightly, but a reading of his testimony certainly rules out Dr. Reed as a witness in support of Wainwright's alleged beating.

In the same Appendix E is testimony by Dr. Levy. This is the sole "evidence" throughout this voluminous record that even hints at support of the alleged "brutal beating"—and the City submits it is rather weak support, the introduction of which Wainwright has called upon the City to effect at the City's expense. Wainwright elicited the aid of the Supreme Court of the United States to achieve this design.

This is Wainwright's appeal, of course, and the City would not cure any defects in it had the City not been ordered to do so by the Supreme Court of the United States. The City of New Orleans quite naturally expects the Supreme Court of the United States to adjust this injustice by ordering Mr. Wainwright to pay for all these

transcripts. Certainly it cannot be that, anywhere in this land, the prosecution bears the burden of perfecting an appeal designed to overthrow the very convictions the prosecution has achieved.

If there is any mention of damage to Mr. Wainwright's groin or to his scrotum — to employ a more delicate term — it escapes notice in that transcript.

Yet, Wainwright has sued seven police officers for a minimum of $100,000 each.

While Wainwright spends this school year in France (he is said to have no financial worries, and the City offers this without proof because who cares) these police officers — maximum salaries $600 per month — have to "moonlight" on extra jobs to support their families.

All this because Mr. Wainwright — in a petulant pique — deemed it too pronounced an invasion of his "rights" to merely bare his left forearm!

Here's what an assistant coroner of Orleans Parish found in an examination of Wainwright:

DEPARTMENT OF POLICE

2700 TULANE AVENUE

NEW ORLEANS, LA.

JOSEPH I. GIARRUSSO
SUPERINTENDENT

ALFRED A. THERIOT
DEPUTY CHIEF FOR ADMINISTRATION

JOSEPH A. GUILLOT
DEPUTY SUPERINTENDENT

ITEM NUMBER J-7405-64

Date Sunday Oct. 18, 1964

TO : Coroner, Parish of Orleans

FROM: Superintendent of Police

Please examine STEPHEN R. WAINWRIGHT

629 URSULINE ST. - APARTMENT 3

NEW ORLEANS, LOUISIANA

for evidence of INJURES ALLEGEDLY SUSTAINED AS THE RESULT OF BEING ARRESTED BY PERSONNEL OF THE NEW ORLEANS POLICE DEPARTMENT ON THE MORNING OF OCTOBER 13th, 1964.

Signature Frank J. Speyerer, Jr.

Rank AGENT

Bureau POLICE BUREAU OF INVESTIGATION

Case of: FRANK SPEYERER (Name) AGENT - N O P D (Rank)

ROMAINE ROUSSET (Name) CAPTAIN-N O P D (Rank) First District Commander

CORONER'S OFFICE
Parish of Orleans
Criminal Court Building
New Orleans, La.

Date October 18, 1964 Time of Examination 10:00 A. M.

Place Coroner's Office

Name Stephen R. Wainwright Sex M Race W Age 25

Address 829 Ursulines Ave.

PURPOSE OF EXAMINATION

Simple Rape ( ) Aggravated Rape ( ) Carnal Knowledge ( )

Other: Specify nature of Offense For evidence of Brutality by Police

Physical Findings:

This is a well-developed, well-nourished white male who appears to be the stated age of 25 years. He complains of pain in the right wrist, left shoulder and groin. He also complains of numbness of the right ring finger.

Physical Examination:

1. Wrist - Examination by inspection, palpation and motion reveals no objective evidence of trauma.
2. Left Shoulder - The arm is carried in a very loose low-hanging sling. Inspection of the area is negative for evidence of trauma. Palpation reveals subjective evidence of pain but no swelling, increased warmth or redness is present. The arm and shoulder can be put through all motions but there is the subjective complaint of pain.
3. Groin, penis & testicles - Examination by inspection and palpation is negative for evidence of injury or trauma.

Microscopic Slide: Vaginal Smear ( ) Other

Spermatozoa Positive ( ) Negative ( )

Other:

L. F. LoCascio, M.D.

Examining Physician Coroner Ass't

Lloyd F. LoCascio, M. D.

CONCLUSION

The City submits, with respect, that the witnesses Wainwright said were left out of the record are now in the record in the various transcripts made part of this Response. The City also submits the transcript will reveal those heavily-relied-upon witnesses (a dean, a professor and an attorney of slight acquaintance with Wainwright's father) know nothing of the facts in the case, were unable to testify to any facts, and proved to be, at best, character witnesses.

In that regard, the City of New Orleans will concede that Wainwright is a person of nice (if somewhat erratic) character whom we wish success in life and the earliest possible attainment of minimal reporting skills.

But, because the City has established that Wainwright's Petition exhibits a complete lacking of basic reporting skills, the City of New Orleans respectfully repeats its early contention that Appellant Wainwright is unworthy of belief — and that his Petition for writs should be denied for that reason alone.

PRAYER — With respect, the City of New Orleans prays that the Supreme Court of the United States:

(1) Deny Petitioner's petition, and

(2) Order Petitioner to pay all costs for this appellate record which is HIS appellate record, and which appellate record is, under law, his burden, and his burden alone, to

perfect — as it is the burden of all appellants to perfect their appellate record.

Respectfully submitted,

ALVIN J. LISKA,
City Attorney,

RICHARD C. SEITHER,
Assistant City Attorney,
City Prosecutor,

Attorneys for Respondent,
Room 2W23 — City Hall,
New Orleans, Louisiana.

CERTIFICATE OF SERVICE

I certify that the above brief has been mailed to all counsel of record on this 11 day of December, 1966.

Richard C. Seither
RICHARD C. SEITHER

APPENDIX A

SUPREME COURT OF LOUISIANA

OPPOSITION BY THE CITY OF NEW ORLEANS TO AN APPLICATION FOR WRITS OF CERTIORARI, PROHIBITION AND MANDAMUS TO THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA, IN THE CASE ENTITLED:

CITY OF NEW ORLEANS
STATE OF LOUISIANA

vs

STEPHEN R. WAINWRIGHT

No. 192-168, Section D

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

ALVIN J. LISKA
City Attorney
and
RICHARD C. SEITHER,
Special Assistant
City Attorney
City Prosecutor
City Hall,
New Orleans, La.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF LOUISIANA:

OPPOSITION TO APPLICATION FOR WRITS

NOW INTO COURT comes Alvin J. Liska, City Attorney, City of New Orleans, through Special Assistant City Attorney Richard C. Seither, the City Prosecutor, who, in opposing defendant-appellant's application for-

writs herein, most respectfully suggest that said application should be denied for the following reasons:

1. No application for a rehearing ever filed.

2. No bills of exception ever perfected.

3. No compliance with Revised Statutes 15:558 which states "an appellate court cannot consider or determine any question which was not submitted to and passed upon by the trial judge."

4. Defendant-appellant is both the attorney and the defendant in this case; and his statement of the case is a gross distortion. (E. g., what he calls a police order "to take off his clothes" on a public street was a police request to afford a glimpse of his left forearm. Defendant was advised by police that he fit the description of a man wanted for murder, that the wanted subject had a tattoo "Born to raise hell" on his left forearm; and a mere showing of his left forearm would have resolved the matter right there without incident, without arrest, without the resultant numerous trials and damage suits which defendant and his actions, conduct, demeanor, behavior and attitude have provoked. Criminal District Court Judge Thos. M. Brahney Jr. reversed a Municipal Court conviction of defendant for resisting arrest, so it could hardly be argued that he favored the city and disfavored the defendant-appellant Wainwright. Yet Brahney wrote, in his decision, that the arrest of Wainwright was legal. "The defendant had no identification on him," Judge Brahney's decision reads, "when he was stopped and he refused to remove his jacket for the purpose of identification. The defendant was belligerent and attempted to walk off on three different occasions and appeared to be using subterfuge to evade the matter. He refused to answer any questions except his name and that he was a law student. He would not

tell his place of birth or give any other information. The officers then arrested him, placed him in a police car and took the defendant to the First District Station. Under the circumstances, the arrest was legal."

Judge Brahney then cites the Estrialgo case, part of which he cited reading:

> "Bare description, presence near the scene of the felony, *suspicious or furtive conduct*, any evidence of this nature has been held to constitute probable cause to establish the identity of the felon." (People vs. Estrialgo, 37 Misc. (2) 264, 233 N.Y.S. 2nd 558.)

"Considering all of the facts and circumstances the police were justified and had reasonable cause to arrest the defendant," Judge Brahney wrote. *"The Court feels that this entire episode could have been avoided if the defendant had merely revealed his arm*, disclosing no tattoo marks and had attempted to be more cooperative."

Apparently the facts, as found in two courts of law, by Municipal Court Judge Andrew G. Bucaro and by the appellate court judge, Criminal District Court Judge Brahney, are grossly different from the facts as alleged by defendant-appellant Wainwright and by attorney Wainwright in his "Statement of the Case.")

ELABORATION ON THE CITY'S FIRST THREE POINTS

1. No application for a rehearing ever filed.

This is a sacramental failing on the part of defendant-appellant. Paragraphs 7, 8 and 9 of Section 5, Rule XII, of the Rules of Supreme Court of Louisiana make mandatory the obligation of defendant to apply for a rehearing; the language used is "MUST."

"Section 5. Each of the duplicate copies of the petition for a writ of review, under the provisions of Section 2 of Act 191 or 1898, p. 437 (R.S. 13:4450), must be verified by the affidavit of the petitioner or his attorney, and *must contain* and in order herein presented be accompanied by:

LOUISIANA SUPREME COURT RULES
RULE 12

6. A legible copy of the opinion rendered by the Court of Appeal.

7. Legible copies of the application for a rehearing and a declaration that a rehearing was applied for and refused, and a showing of the date of refusal, if a rehearing was refused.

8. A legible copy of the reasons given by the Court of Appeal for refusing a rehearing if such reasons were given.

9. A legible copy of the opinion rendered by the Court of Appeal on rehearing, if a rehearing was granted by the Court of Appeal before the case was finally decided by that Court.

10. Legible copies of all the briefs that were filed in the Court of Appeal.

Before the petition is presented to the Supreme Court, a copy of the petition must be delivered or mailed to the adverse party.

The City also includes this photostat of "Amendment of Uniform Rules, Courts of Appeal (1965)" as printed on Page 253 of the Louisiana State Bar Journal "primarily to inform members of the Bar as to the effect of the Supreme Court's recent rulings." The City begs leave of the Honorable Supreme Court to note that the City has italicized the part particularly pertinent to this argument:

AMENDMENT OF UNIFORM RULES, COURT OF APPEAL (1965)

The Uniform Rules are hereby amended to provide the following additional section to Rule XII (Remedial writs):

"Section 7. After a remedial or supervisory writ is granted, the matter shall be decided and the judgment of the court shall become final and executory in the same manner and upon the expiration of the same delays as if the case had been decided on appeal."

* * * * *

Revision Committee's Comment:

Until recently, after a remedial writ was granted, the subsequent judgment of the court of appeal was (in the absence of stay order) regarded as executory immediately and without any delay to apply for rehearing, since the judgment was rendered upon the plenary supervisory jurisdiction not under the appellate jurisdiction regulated by statute. Davis v. LeBlanc, 139 So. 2d 224 (La. App. 1962); 23 La. Law Rev. 390 (1963); 38 Tul. Law Rev. 442-443 (1964). Cf. also, with reference to the Supreme Court's power under its supervisory jurisdiction to review court of appeal judgments without regard to time limits or other limitations upon its power to review intermediate judgments under the court's appellate jurisdiction: In re Lindner, 122 La. 683, 48 So. 150 (1909); 34 Tul. Law Rev. 165, 169 (footnote 27); Reporter's Comment, Article 2201, Louisiana Code of Civil Procedure.

However, the Supreme Court has recently indicated that the exclusive remedy for review of court of appeal judgments rendered by exercise of the supervisory jurisdiction is provided by Section 11 of Article VII of the Constitution (formerly thought applicable only to review of appellate-jurisdiction judgments). Pelloat v. The Greater

New Orleans Expressway Commission, 248 La. 122, 176 So. 2d 452 (1965); Asp., Incorporated v. Capital Bank & Trust Co., 247 La. 724, 174 So. 2d 133 (1965); Joint Legislative Committee v. Fuselier, 247 La. 723, 174 So. 2d 133 (1965). If so, *the Supreme Court may not review a court of appeal judgment, even though rendered through exercise of supervisory jurisdiction, unless a rehearing has been refused by the intermediate court*, with the court of appeal judgment not becoming executory at least until expiration of the thirty-day delay allowed within which to apply for Supreme Court review. The rules change hereby adopted reflects this interpretation, and it is intended primarily to inform members of the Bar as to the effect of the Supreme Court's recent rulings.

2. No bills of exception perfected.

The City is annexing, with respect, copy of a Nov. 23, 1965 ruling by the Louisiana Supreme Court in the Ulysses Tanner case. Defense Attorneys Sam Monk Zelden and Bernard Hofton had reserved many bills during the trial but had never perfected one of them on appeal. No bills of exception have been perfected in this Wainwright case.

SUPREME COURT OF LOUISIANA

New Orleans, 70112

City of New Orleans

v.

Ulysses Tanner

November 23, 1965

No. 47,989

- - - - - - -

In re: Ulysses Tanner applying for writs of certiorari, mandamus and prohibition

- - - - - - -

Writs refused. No bills of exception perfected. The application as filed in this court is insufficient for our consideration of the sufficiency of the charge. See La. Code Crim. Proc. Art. 422(1), and State ex rel Contonio v. Judge, 105 La. 758, 30 So. 105, and authorities therein cited.

/s/ FWH
/s/ JBH
/s/ EHMcC
/s/ WBH
/s/ JWS
/s/ FWS

- - - - - - -

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, March 8, 1966

/s/ Hugh St. Paul
Deputy Clerk

The City asks this Honorable Court to invoke the same law, R.S. 15:422(1) and the Cotonio case, 105 La. 758, 30 So. 105, as its basis for refusing writs in this Wainwright case.

But the City cannot ignore Mr. Wainwright's contention that the record is not complete herein. The City must first refute the written statement by Mr. Wainwright, page 5 of his application for writs herein, that:

> "In the record tendered by the City of New Orleans to Judge Brahney, Jr., of the Criminal District Court, the vital parts of the transcript were not included so that Judge Brahney had no opportunity to make a sound decision on the record."

The fact is that the Wainwright forces agreed, in a letter dated November 17, 1965 that "we will stand on the record as transcribed.

Wainwright has been represented, until these writs herein were filed by Wainwright in person as both defendant and attorney, by a Shreveport attorney named Dan A. Spencer.

On November 17, 1965 Judge Brahney wrote Spencer (see Brahney's letter annexed, and see Spencer's answering letter annexed) that "I am unable to take any action in this matter until you advise me whether or not the record, which I have in my court, is complete and accurate and that you wish to proceed on the record as is. If the record is not complete and accurate then you take whatever steps you deem necessary to see that it is made complete and accurate. I must admit that I am confused by the opening paragraph of your brief and until you clarify it further for me, I will not take any further action in this matter."

Spencer answered, in a letter strangely dated the same day, November 17, 1965 that "we will stand on the record as transcribed."

Both these letters are part of the official file in the Orleans Parish Criminal District Court.

Judge Brahney requested that the City have certified true copies made of these letters and that they be submitted to the Louisiana Supreme Court for inclusion in the record along with Wainwright's writs application. Here are those letters:

November 17, 1965.

Mr. Dan A. Spencer,
Attorney at Law,
3420 Greenwood Road,
Shreveport, Louisiana #71109.

Re: City of New Orleans versus Stephen R. Wainwright, No. 192-168

Dear Mr. Spencer:

This morning I located your brief which you referred to in your letter, in case #189-939. From the first paragraph of your brief I am unable to take any action in this matter until you advise me whether or not the record, which I have in my court, is complete and accurate and that you wish to proceed on the record as is. If the record is not complete and accurate then, you take whatever steps you deem necessary to see that it is made complete and accurate. I must admit that I am confused by the opening paragraph of your brief and, until you clarify it further for me, I will not take any further action in this matter.

For your information, the matter was argued briefly by the City this morning; however, because of these later

developments I will continue this matter as an open case until I hear from you further.

Very truly yours,

THOS. M. BRAHNEY, JR.

TB:TS

Clerk's Office 3-8 1966

A TRUE COPY

L. Altobello, Deputy Clerk,
Criminal District Court,
Parish of Orleans

DAN A. SPENCER
Attorney and Counselor at Law

Telephone
631-7469

3420 Greenwood Road
Shreveport, Louisiana
71109

November 17, 1965

Judge Thomas M. Brahney, Jr.
Criminal District Court
Section "D"
Parish of Orleans
New Orleans 19, Louisiana

Re: City of New Orleans v. Stephen R. Wainwright, No. 192-168

Dear Judge Brahney:

Thank you for your letter of November 17, 1965. My objection to the record is primarily based on the failure of the reporter to include therein my argument on the law in making certain objections and motions during the course of the trial.

It is my understanding that legal objections to a trial in Municipal Court may be supplied on appeal in the Criminal District Court. Judge Becker has previously informed me that it is not necessary to reserve bills of exception in the Municipal Court in order to preserve errors for the appeal.

I believe there are in this case errors patent on the face of this record. These are, I believe, fully covered in my brief. If your appreciation of the law is in accordance with mine, i e, that it is not necessary to reserve bills of exception, or to have the record show the legal grounds argued in support of objections and motions, we will stand on the record as transcribed.

Thank you for taking the trouble to write me about this matter. I am, with kindest regards

Yours very truly,

/s/ DAN A. SPENCER
Dan A. Spencer

DAS/jcd

Clerk's Office 3-8 1966

A TRUE COPY

L. Altobello, Deputy Clerk,
Criminal District Court,
Parish of Orleans

3. No compliance with R.S. 15:558, which reads:

> "Unless the error is patent on the face of the record, an appellate court can not consider or determine any question which was not submitted to and passed upon by the trial judge."

The City submits that this article means, simply, any judge has the right to pass on a matter before he can be reversed on it.

That's the reason it's so important for bills of exception to be perfected; part of that perfection is the judge's per curiam to those of his rulings to which the objections lie. That's the reason for the necessity of a motion for a rehearing; so there will be in the record on appeal just what the positions of the parties and of the judge are.

For the four reasons set forth by the City, and elaborated upon by the City, it is most respectfully requested that Wainwright's application for writs be refused.

/s/ ALVIN J. LISKA
ALVIN J. LISKA
City Attorney

/s/ RICHARD C. SEITHER
RICHARD C. SEITHER
City Prosecutor

STATE OF LOUISIANA:

PARISH OF ORLEANS:

BEFORE ME, the undersigned authority, personally came and appeared:

ALVIN J. LISKA

and

RICHARD C. SEITHER

who, being first by me duly sworn, did depose and say that they have read all of the foregoing opposition to writs, that it is all true and correct, and that two copies have been mailed to the defendant-appellant, Stephen R. Wainwright.

/s/ ALVIN J. LISKA
ALVIN J. LISKA

/s/ RICHARD C. SEITHER
RICHARD C. SEITHER

Sworn to and subscribed before me
this 22nd day of March, 1966.

/s/ WM. BOYELLE, N. P.
NOTARY PUBLIC

MUNICIPAL COURTS
OF NEW ORLEANS
501 N. RAMPART STREET
NEW ORLEANS, LA. 70116

W. BLAIR LANCASTER, JR., JUDGE,
FIRST MUNICIPAL COURT

ANDREW G. BUCARO, JUDGE,
SECOND MUNICIPAL COURT

JOSEPH R. BOSSETTA, JUDGE,
THIRD MUNICIPAL COURT

EDWIN A. BABYLON, JUDGE,
NIGHT MUNICIPAL COURT

ARTHUR J. BOE,
CLERK, MUNICIPAL COURTS.

August 6,1965

Mr. Edward A. Haggerty, Clerk
Criminal District Court
Tulane Avenue and Broad Street
New Orleans, Louisiana

Re: City of New Orleans vs. Stephen Wainwright - No. 83469-A, et al.

Dear Sir:

Attached hereto is transcript of testimony in connection with the above matter:

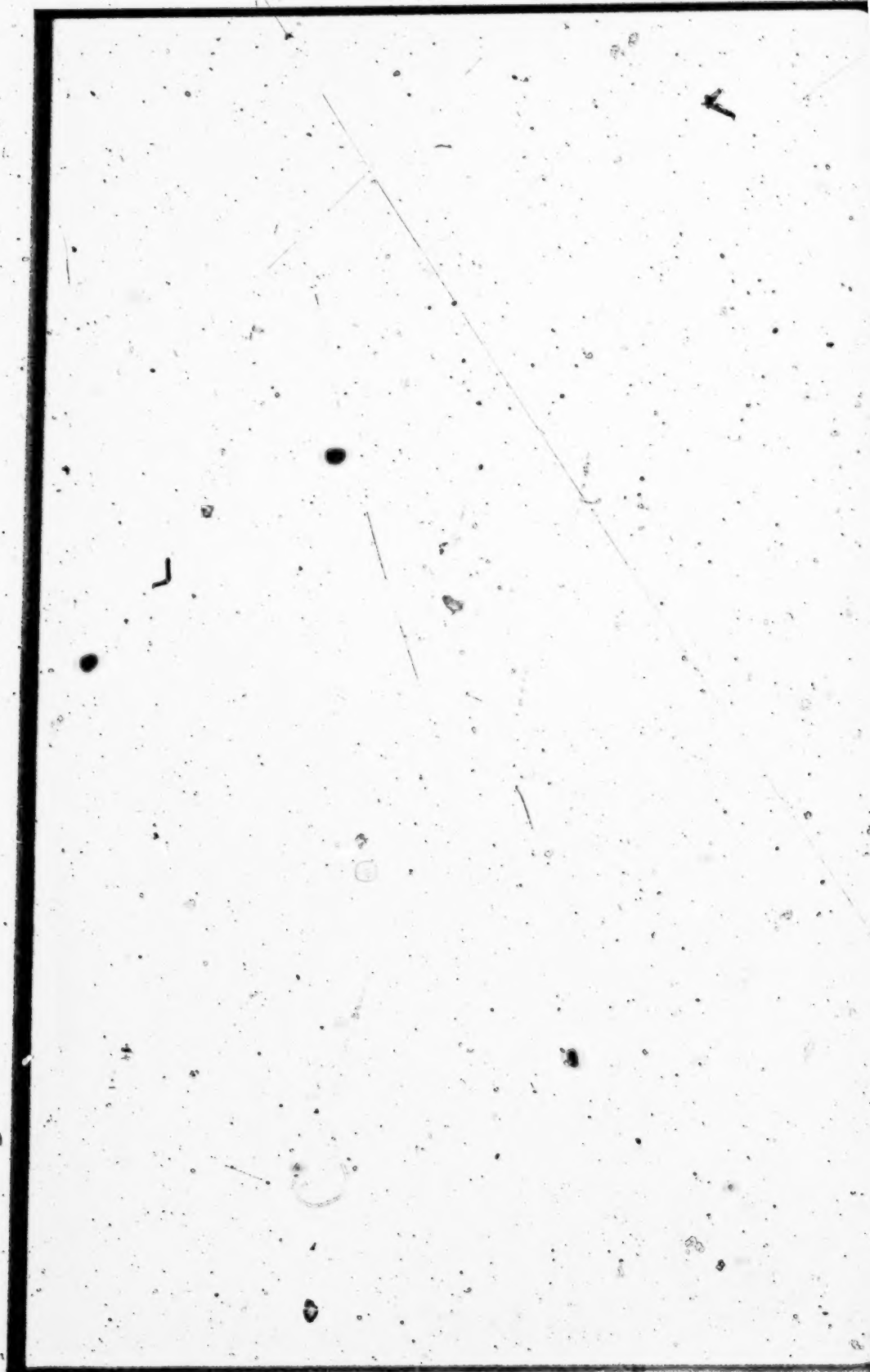
INDEX

Testimony	Pages 1 thru 43
Affidavits	Pages 44 thru 46
Appearance Bail Bond	Page 47
Motion for Appeal	Page 48
Appeal Bail Bond	Page 49
Ordinance No.828 MCS, Sections 49-2 and 42-24	Pages 50 thru 51

Very truly yours,

ARTHUR J. BOE,
CLERK.

AJB/gh
encls.
RECEIPT IS ACKNOWLEDGED:
DATE:_____
BY:_____
EVIDENCE: 1- copy of letter dated July 7,1965 addressed to Clerk, Municipal Court, 500 N.Rampart St., New Orleans, La. by Dan A. Spencer - Case No. 80503-B.



NO. 83469-A

CHARGES

VIOLATION OF ORDINANCE NO. 828 M.C.S., SECTION 49-2, RELATIVE TO RESISTING AN OFFICER, SECTION 42-24, RELATIVE TO DISTURBING THE PEACE BY ASSAULT ON PATN. GEORGE O'ROURKE, AND SECTION 42-24, DISTURBING THE PEACE BY ASSAULT ON PATN. FRANK GILFORD.

CITY OF NEW ORLEANS
VERSUS
STEPHEN R. WAINWRIGHT

TRANSCRIPT OF TESTIMONY AND NOTES OF EVIDENCE IN THE ABOVE NUMBERED AND ENTITLED CAUSE, THE SAME BEING TAKEN IN OPEN COURT ON THE 16TH. DAY OF JULY, 1965,

BEFORE THE HONORABLE,
ANDREW G. BUCARO, JUDGE,
FIRST MUNICIPAL COURT,

ON BEHALF OF THE CITY AND THE ACCUSED:

PRESENT IN COURT: (10:45 O'CLOCK A.M.)

1. MR. STEPHEN R. WAINWRIGHT, DEFENDANT, 36 South Street, Brockton, Massachusetts, represented by MR. DAN A. SPENCER, Attorney at Law, 3420 Greenwood Drive, Shreveport, Louisiana.

THE FOLLOWING WITNESSES FOR THE CITY OF NEW ORLEANS:

2. LT. F. MARTELLO,
3. PATN. E. BOEPPLE,
4. PATN. J. OTTESEN,
5. DET. D. KENT,
6. DET R. TOWNSEND,
7. PATN. G. O'ROURKE,
8. PATN. F. GILFORD.

PRESENT IN COURT: (11:20 O'CLOCK A.M.)

9. MR. J. B. KIEFER, Attorney at Law, National Bank of Commerce Building, New Orleans, La., representing the City of New Orleans.

REPORTED BY: Gerry Heaton, Stenographer.

COURT:

Mr. Kiefer telephoned the Court to say he was occupied in the District Court of Jefferson Parish, which is a Court of superior jurisdiction. Contacted his office twice, and Mr. Kiefer is not available for our telephone calls and has not replied. At this time I would like to state that all City witnesses that are listed on the affidavits, Lt. F. Martello, Patn. E. Boepple, Patn. J. Ottesen, Det. D. Kent, Det. R. Townsend, Patn. G. O'Rourke, and Patn. F. Gilford are all present in Court today.

Defendant is also present in Court. His attorney is present in Court. However, the City Attorney has informed the Court, through his office, that he is involved in a matter in the District Court of Jefferson Parish. Let the record show that the following City witnesses are all present in Court at this time:

1. Lt. F. Martello
2. Patn. E. Boepple
3. Patn. J. Ottesen
4. Det. D. Kent
5. Det. R. Townsend
6. Patn. G. O'Rourke
7. Patn. F. Gilford

however the City Attorney is not available and therefore the matter is going to be re-set.

ATTORNEY DAN A. SPENCER:

Mr. Wainwright has traveled a distance of seventeen hundred miles. I traveled three hundred miles to be here today. I would like to go to trial if at all possible.

COURT:

This is the information we have received from Mr. Kiefer's office, and we have made two attempts to contact him.

ATTORNEY DAN A. SPENCER:

I am asking leave to file copies of letters written on July 7, 1965 to the Clerk of the Municipal Court, 500 N. Rampart Street, New Orleans, La., a copy of which was sent to Honorable Judge Bucaro, Municipal Court, Section B, 500 North Rampart St., New Orleans, La.; to Honorable Judge, Municipal Court, Section A, 500 North Rampart St., New Orleans, La., and a copy to my client Mr. Stephen R. Wainwright, 36 South St., Brockton, Massachusetts, and I now file in evidence this copy of letter requesting to be notified if the case was to be held today, in view of the fact that defendant was travelling from Massachusetts, and his attorney from Shreveport, Louisiana to be present today.

COURT:

Let the record reveal all parties served, however, the City is not prepared because of the fact that Mr. Kiefer is in a Court of superior jurisdiction. That is the information received from his office. The Court is ready, willing and able to hear the matter.

ATTORNEY DAN A. SPENCER:

I move that the case be dismissed for non-prosecution by the City.

COURT:

Motion is denied. Anything else you want Mr. Spencer.

ATTORNEY DAN A. SPENCER:

No, sir.

11:20 O'CLOCK A.M. — JULY 16, 1965

COURT:

Let the record indicate that the Court is now back in session to accommodate defendant and his attorney.

COURT TO DEFENDANT STEPHEN R. WAINWRIGHT:

Q. Are you uncomfortable standing?

A. No, but if I would have to do it for a long period of time I would be very uncomfortable.

COURT:

Let the record show the Court, since contacted by Mr. Kiefer, was certain he had notice of this matter, but information received from Mr. Kiefer is he didn't receive timely notice, and he was since notified by telephone.

ATTORNEY J. B. KIEFER, REPRESENTING THE CITY OF NEW ORLEANS:

While I was present at the time of the arraignment, the cases had not been allotted, and that when they were allotted these cases were set for trial in the division to which they were allotted, and that this is an additional reason today, that I had absolutely no notice of the date upon which these matters were set for trial.

COURT:

Are you prepared for trial Mr. Kiefer?

ATTORNEY J. B. KIEFER:

I am not prepared for trial because I didn't know the matter was set for today.

COURT:

I would prefer granting it to you but I think I will not.

ATTORNEY DAN A. SPENCER:

I move that the defendant be allowed to sit down because he has a bad back.

STEPHEN R. WAINWRIGHT, DEFENDANT, BEING DULY SWORN, TESTIFIED:

ATTORNEY DAN A. SPENCER TO STEPHEN R. WAINWRIGHT:

Q. State your name.

A. Stephen R. Wainwright.

Q. You have a physical disability?

A. I have a bad back.

Q. Any other physical disability?

A. I am presently under treatment for blood ulcers.

Q. Any further questions?

ATTORNEY J. B. KIEFER:

I have no objection.

COURT:

Have a seat Mr. Wainwright.

ATTORNEY J. B. KIEFER:

I would like the witnesses to be sequestered. I would like to call Lt. F. Martello.

ATTORNEY DAN A. SPENCER:

I would like the City witnesses not to discuss the case amongst themselves until the matter is concluded.

COURT:

Call them back. (Witnesses enter Court) The Attorney for Defendant has requested that I instruct you not to discuss this matter, and you are so instructed.

LT. FRANCIS MARTELLO, BEING DULY SWORN, TESTIFIED:

ATTORNEY J. B. KIEFER TO LT. FRANCIS MARTELLO:

Q. State your name please.

A. Lt. Francis L. Martello.

Q. You are a member of the New Orleans Police Department, so employed on Friday, October 13, 1964, at approximately one o'clock A.M.?

ATTORNEY DAN A. SPENCER:

I object.

COURT:

Answer the question.

A. Yes.

ATTORNEY J. B. KIEFER TO LT. FRANCIS MARTELLO:

Q. Do you recognize defendant in Court?

A. Yes.

Q. Where is he?

A. Sitting in the first seat of the first row.

Q. Please tell the Court when you first saw him on or before the date of October 13th., 1965. I wish at this time to amend the record to reflect 1964 instead of 1965.

COURT:

Hand me the record and I will amend it to read 1964. The Court feels that this is a typographical error.

ATTORNEY J. B. KIEFER TO LT. FRANCIS MARTELLO:

Q. In that regard it is your testimony you were so employed by the New Orleans Police Department on the 13th. day of Friday, October, 1964?

A. Yes.

Q. Please tell the Court when, on, or before that date you first saw the defendant and where?

A. I saw the defendant in the First District Station.

Q. When you first saw him?

A. In the First District Station.

Q. That was the first time you had seen him that day?

A. Yes.

Q. You hadn't seen him before you came to the First District Station?

A. Correct.

Q. In what capacity were you serving in the First District Station?

A. Lieutenant on platoon.

Q. Under what circumstances did you see him in the First District Station?

A. He was under arrest.

Q. Do you recall the arresting officers?

A. Yes. Officer Boepple and Officer Ottesen.

Q. Please tell the Court what you observed at that date and time.

A. He was under arrest by Officer Boepple and Officer Ottesen. He was placed in the booking cage, and he was booked, and I had asked him to remove his jacket, which is part of the booking procedure, which is outlined in the manual of the New Orleans Police Department.

Mr. Wainwright refused to take his jacket off. I explained all prisoners must be thoroughly searched and he should cooperate with us by removing his jacket for identification purposes, and also for any weapons, which a person may have on him at the time he is booked for the security of the prisoner and the Police Officer.

He again refused to take his jacket off, so I instructed him I would have the jacket removed by the doorman.

He again refused. He walked into a corner grabbed his jacket by his hands, folding his arms, and he said, "If you want this jacket off take it off".

Q. Please show the Court just what you mean.

A. (Lt. Martello demonstrates). He went into the corner crouched down, and he said, "If you want this jacket off take it off". I instructed Officer Gilford and Officer O'Rourke to remove his jacket.

Q. Did he give you any reason why he didn't want his jacket removed?

A. He said that he was a law student. He knew the law and he didn't want the jacket off.

Q. Proceed.

A. Officer O'Rourke and Officer Gilford asked him to take the jacket off and he didn't respond, so they physically took the jacket off of him. He done everything in his power to keep them from removing the jacket. In this operation the officers were bounced from wall to wall physically, and with the assistance of a couple of other police officers they put handcuffs on one of his arms, and they removed his jacket.

Q. No other questions at this time.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Lt. Martello, how did you know the defendant was under arrest?

A. The officers told me he was under arrest.

Q. That is the only knowledge you had?

A. Yes, correct.

Q. Were you present when he was brought into the First District Station?

A. I was not present when he was brought in.

Q. Do you know how long he had been in there before you came in?

A. A very short while.

Q. Where was he in the Police Station when you first saw him?

A. In the Desk Sergeant's Room.

Q. That is behind the cage as one walks into the station?

A. No. Behind the cage there is a Desk Sergeant's booking area or cage, in the rear of that is a booking area. There is a walk-way, to the right is the Captain's room and to the left * * *

Q. This is a separate office?

A. Separate office.

Q. It is common practice to take a prisoner into the Desk Sergeant's office?

A. It is. Yes. It depends on what he is charged with.

Q. A person charged with vagrancy, it is a common practice to take such a person into the Desk Sergeant's office?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Let's hear him answer it.

LT. FRANCIS MARTELLO:

A. It depends on the case. As a general rule more people are brought into the Desk Sergeant's area depending on what they are charged with. Traffic violations, no. If you want to question a person, yes.

ATTORNEY DAN A SPENCER TO LT. FRANCIS MARTELLO:

Q. For what purpose was the defendant taken into the Desk Sergeant's office?

A. I wasn't present. I assume it was to question him.

Q. When you walked in was he being questioned?

A. I couldn't hear if he was. I wouldn't know if he was or not.

Q. Was he talking to someone when you came in?
A. When I walked into the station the officer came up to me and spoke to me.

Q. With regard to Mr. Wainwright?
A. That is correct.

Q. What did he say to you?
A. He had Mr. Wainwright under arrest.

Q. Did he say anything else?
A. Yes, he did.

Q. What did he say?
A. He stated * * *

ATTORNEY J. B. KIEFER:
I object until he is identified.

COURT:
Who is the officer?

LT. FRANCIS MARTELLO:
A. Officer Boepple.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:
Q. What did he say to you?

ATTORNEY J. B. KIEFER:
I object. Officer Boepple is here and can testify as to what he said.

COURT:
Answer the question Lt. Martello.

LT. FRANCIS MARTELLO:
A. He said he had subject under arrest. He fit the general description of a subject who was wanted for murder. Also, the subject who was wanted for murder had a tattoo on his left arm "born to raise hell".

He showed me a composite or drawing of one Johnnie McTaylor. He said that this man

would not answer any questions concerning this investigation. He had asked this man on the scene to remove his jacket for the purpose of identification. This man was informed that he fitted the general description of a man wanted as a suspect in a murder case. This arrested subject had no identification on him whatsoever, was very belligerent; he attempted to walk off on three different occasions, and was possibly using subterfuge to evade the matter.

Q. Anything else?

A. I asked him to remove his jacket.

Q. This was in the Desk Sergeant's office?

A. Yes.

Q. What did he say then?

A. He demanded the right to use the telephone. He said he wasn't going to remove his jacket. I told him he has a right to use the 'phone. I said all right, we will book you first. He wanted to use the telephone. I told him you have to be booked before you can use the telephone. I told him he had to be searched before he could use the telephone. This is what he objected to.

Q. Do you know what the term frisk a prisoner means?

A. Generally on the street where you pat a person down for obvious weapons.

Q. Did you frisk the defendant in the police station?

A. No.

Q. Did anyone else in your presence frisk him?

A. No.

Q. Do you know if Officer Boepple had frisked him prior to bringing him into the station?

A. No.

Q. Is it customary police procedure to do so?
A. Yes.

Q. You assume they had done so?
A. Yes.

Q. Does frisking a defendant reveal whether or not he has weapons on him?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Sustained.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Describe the jacket Mr. Wainwright had on.
A. I believe it was a real light weight jacket.

Q. Very thin?
A. Yes, very thin.

Q. Do you know what he had on under it?
A. Not at that time, but after we took the jacket off we did.

Q. What did he have on under it?
A. A T-shirt.

Q. It wasn't possible for you to determine whether or not he had any weapons on him without taking the jacket off?
A. No, sir.

Q. Do you take a person's pants off to search for weapons?
A. It depends on the case.

Q. How about vagrancy?
A. Yes, depending on the case.

Q. Always?
A. Not always.

Q. How many times in the last two weeks have you seen members of the New Orleans Police Department remove trousers to see if a person had weapons on him?

A. (No answer)

Q. Did you ask Mr. Wainwright to remove his trousers?

A. No, sir. No need to.

Q. Why no need to?

A. He was thoroughly searched by the competent doorman we have. I was satisfied.

COURT:

Were you searching for weapons or marks?

LT. FRANCIS MARTELLO:

A. To determine whether or not he had a mark on his arm.

COURT:

Are "shakedown" and "frisk" related?

LT. FRANCIS MARTELLO:

A. Generally speaking "shakedown" means frisk. Sometimes it is used to search a prisoner. It depends on the Officer.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. You refused to allow Mr. Wainwright to use the telephone until his jacket had been ripped from him?

A. No I didn't refuse him; he had to be booked and searched.

Q. You didn't allow him to use the telephone?

A. He didn't make an issue of it.

Q. He did ask to use the telephone before he was searched?

A. Yes. I told him no he had to be booked and searched first.

Q. Is it customary police procedure to do so?
A. Yes.

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A. Yes.

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ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. You refused to allow Mr. Wainwright to use the telephone until his jacket had been ripped from him?

A. No I didn't refuse him; he had to be booked and searched.

Q. You didn't allow him to use the telephone?

A. He didn't make an issue of it.

Q. He did ask to use the telephone before he was searched?

A. Yes. I told him no he had to be booked and searched first.

Q. You refused him to use the telephone?

A. He used the telephone after he was searched.

Q. You refused to allow him before he was searched?

A. No.

Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

A. He tried to keep it on by holding it.

Q. How?

A. By folding his arms. (demonstrates)

Q. He didn't do anything else?

A. No, not to my knowledge.

Q. If Officer O'Rourke and Officer Gilford got thrown around the room, it was through their own effort?

A. No, it was the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

Q. He didn't do anything but try to hold the jacket on?

A. They tried to take it off, and he was trying to keep the jacket on.

Q. He held very still?

A. No, it was a struggle.

Q. Did he strike out at the officers?

A. No.

Q. Did he kick the officers?

A. I didn't see him. He could have. I didn't see him. It wasn't visible to me.

Q. How many officers were involved in an attempt to take his jacket off of him?

A. Officer Gilford, Officer O'Rourke, Officer Wilson and Mr. Kent — four.

Q. Lt. Martello, when you first entered the police station you were informed by the officer present that Mr. Wainwright refused to answer questions regarding this murder investigation?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Permit the question.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. When you first walked into the police station and was informed by the officer that Mr. Wainwright refused to answer questions regarding this murder investigation, didn't you say "Take that dirty S.O.B. in the interrogation room and take that jacket off of him"?

A. No.

Q. Did you say anything of the kind?

A. No.

Q. Did they take the jacket off of Mr. Wainwright on your command?

A. My sole command.

Q. Did you not curse Mr. Wainwright in the police station?

A. No.

Q. Was Mr. Wainwright asked if he wanted to call an attorney before he was searched?

A. No. He wanted to use the telephone.

Q. Did you assist the officers in taking his jacket off?

A. No, but I ordered it.

Q. You didn't touch him yourself?

A. No.

Q. What were the names of the other officers besides O'Rourke and Gilford?

A. Officer Kent and Officer Townsend, I believe.

Q. How about Officer Boepple?

A. He was on the outside; so was Officer Ottesen, I believe. I am not sure. I could be wrong.

Q. Five of them?

A. Four or five. I am not positive.

Q. Did you see them strike Mr. Wainwright?

A. No.

Q. Did you see any of them knee him?

A. No.

Q. Did you see any of them twist his arm behind a bar?

A. No. What kind of a bar?

Q. A steel bar?

A. No steel bars in the First District. They had a handcuff on his arm. I don't know whether they twisted it or not. They could have.

COURT:

If they had twisted his arm, was there reason to?

LT. FRANCIS MARTELLO:

If they did it was logical in my opinion.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Lt. Martello you testified that the primary purpose for removal of the jacket was for identification purposes, was that correct?

A. Correct.

Q. How did you plan to identify him by the tattoo?

A. Correct.

Q. On what part of his body?

A. Left forearm.

Q. Were there any members of the New Orleans Police Department who, to your knowledge, could have identified this murder suspect had they seen him?

A. No. Not by sight but by investigation. In the line of investigation.

Q. How are composites drawn up, Lt. Martello?

A. By a specialist in the Police Department, who is a technician that we have, who interviews various witnesses and suspects and from their words he draws a picture or photograph.

Q. Do you know if the murder suspect had ever been arrested in New Orleans before?

A. Which one?

Q. The one you mistakingly identified Mr. Wainwright as?

A. It has never been clarified whether the man we were looking for as the murder suspect, is the man who committed the murder. It is still an open case.

Q. Lt. Martello, what was the name of the person you took Mr. Wainwright for?

A. Johnnie McTaylor.

Q. Has he ever been arrested by the New Orleans Police Department before?

A. I don't know.

Q. Lt. Martello, is it not true that two police officers who could identify Johnnie McTaylor were on their way to the Police Station at the time you ripped the clothing off Mr. Wainwright?

A. I didn't rip the clothing off of him. I didn't know if these officers had specific knowledge they could identify him.

Q. Is it not true that these two officers were on

their way to the station at the time?

A. I had no knowledge of this.

Q. Did you later learn that two such officers were on their way to the Police Station?

COURT:

The Court will rule the question is irrelevant and the Officer need not answer it?

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Lt. Martello did two officers, who could have identified the murder suspect, come to the First District Police Station on the night Mr. Wainwright was arrested?

A. Two police officers from homicide who came to the First District Station — what knowledge they had, I don't know.

Q. You don't know whether or not they came there to identify Mr. Wainwright or not?

A. They were at the station. They were assigned to this case. Whether they could, or could not identify Mr. Wainwright as one Johnnie McTaylor I don't know.

COURT:

All information is in the record on the previous question. No objection by the City and the City permitted this information in the record later.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Lt. Martello, before Mr. Wainwright's clothes were torn off of him, did any officer, Officer Boepple, or any one else, tell you they had called and some one was coming over to identify the defendant?

A. (No answer)

Q. No further questions.

ATTORNEY J. B. KIEFER TO LT. FRANCIS MARTELLO:

Q. The First District, which is located at Basin and St. Louis Streets, is that in the City of New Orleans?

A. Yes. 501 N. Rampart.

Q. How long have you been with the New Orleans Police Department?

A. I am in my seventeenth year.

Q. Describe to the Court the conduct of the defendant at the time of the incident?

ATTORNEY DAN A. SPENCER:

I object. This has already been covered.

COURT:

This has been covered. Lt. Martello the officers who removed the jacket from Mr. Wainwright subsequent to what you called a struggle, did any of them have marks, bruises, or torn clothing?

LT. FRANCIS MARTELLO:

No.

ATTORNEY DAN A. SPENCER TO LT. FRANCIS MARTELLO:

Q. Lt. Martello, why didn't you file an affidavit against Mr. Wainwright for assault prior to May 14th. of this year?

ATTORNEY J. B. KIEFER:

I object. The Office of the City Attorney . . .

COURT:

Sustained.

OFFICER GEORGE O'ROURKE BEING FIRST DULY SWORN, TESTIFIED:

ATTORNEY J. B. KIEFER TO OFFICER GEORGE O'ROURKE:

Q. State your name.

A. George O'Rourke.

Q. Are you a member of the New Orleans Police Department and so employed on Friday, October 13, 1964, at approximately 1:25 AM?

A. Yes.

Q. Where were you serving at that time?

A. Doorman at the First District.

Q. In that capacity did you have any occasion to see the defendant? Do you recognize Stephen R. Wainwright?

A. Yes.

Q. Where is he?

A. That is Mr. Wainwright. (Pointing) That is Mr. Spencer. (Pointing)

Q. Mr. Wainwright is seated in the first row?

A. Yes.

Q. Do you recall the incident, which occurred at the First District Station on that date and time?

A. Yes.

Q. Did it involve the defendant?

A. Yes.

Q. Please tell the Court what occurred?

A. Mr. Wainwright was put behind the booking cage, and he was placed on the books with charges that the officers placed upon him. After the charges were placed, he was asked to remove a jacket he had on. The officers wanted to see if he had a tattoo on his arm.

He was picked up as a suspect that may have been wanted for murder.

Mr. Wainwright put his arms over his chest and backed up into a corner. Lt. Martello asked him to take the jacket off, and he just looked at us. He was asked again. He said, "If you want this jacket you will have to take it off."

We approached Mr. Wainwright, Officer Gilford and myself. Officer Gilford to the left, and I am on the right. We got hold of each of his arms. We tried to pry his arms apart, and in the meantime we were bounced from wall to wall and bench to bench and back again.

COURT:

Demonstrate.

OFFICER GEORGE O'ROURKE:

Well I tried to get one arm and Gilford the other. Mr. Wainwright when I tried to get his right arm, would rush me to the side, and when Gilford tried to get the left arm, he would push him to the side. We went back and forth.

COURT:

What is your weight Officer O'Rourke?

OFFICER GEORGE O'ROURKE:

At that time about one hundred and eighty pounds.

COURT:

What is your age?

OFFICER GEORGE O'ROURKE:

Forty-four.

COURT:

The Court observed Mr. O'Rourke. He has a little stomach but mostly brawn or muscle.

ATTORNEY J. B. KIEFER TO OFFICER GEORGE O'ROURKE:

Q. Who told you to remove this jacket?

A. Lt. Martello.

Q. Did you remove the jacket?

A. Yes.

Q. Were you injured in any way?

A. No. A little soreness, here and there.

Q. No further questions.

ATTORNEY DAN A. SPENCER TO OFFICER GEORGE O'ROURKE:

Q. Mr. O'Rourke, were you present when Mr. Wainwright was brought into the Station?

A. Yes.

Q. Where were you?

A. Behind the booking cage.

Q. Was Lt. Martello there then?

A. I cannot recall if he was in the area at the time. We sit back there to catch up on the Manual or any other items we have to read up on.

Q. What took place immediately upon Mr. Wainwright's being brought in? What did the officers do with him when they brought him in?

A. I don't know.

Q. You were there?

A. In the booking cage.

Q. Did you see them bring him in?

A. No.

Q. When did you see him first?

A. When he was brought from the Interrogation Room to be brought to the Booking Room.

Q. He had been in the Interrogation Room?

A. I assume.

Q. Did you hear Mr. Wainwright ask to use the telephone?

A. Yes.

Q. When was this?

A. After he was booked and put up a struggle to get his jacket off.

Q. He didn't ask to use it before his jacket was removed?

A. No.

Q. When he was brought up to be booked, did he ask to use the telephone?

A. No, sir.

Q. After he was booked and before the jacket was removed, did he ask to use the telephone?

A. No, sir.

Q. Did he ever ask to see a lawyer?

A. No, sir.

Q. How many officers did it take to get his jacket off?

A. Three of us. Two of us and when we got his right hand away from his chest, I asked for handcuffs. Officer Kent gave them to me.

Q. Other than that no one else assisted you?

A. Yes, Officer Gilford.

Q. Were other officers present besides Officer Gilford and yourself?

A. No, sir. Officer Gilford and myself and during the struggle Officer Kent came to our assistance.

COURT TO OFFICER GEORGE O'ROURKE:

Q. The booking cage and the interrogation office are two separate rooms?

A. Yes.

Q. Could you be in the interrogation office talking

to some one and some one in the booking cage not know you were in there?

A. Yes.

Q. Completely separate?

A. Yes.

Q. Closed door?

A. Yes.

ATTORNEY DAN A. SPENCER TO OFFICER GEORGE O'ROURKE:

Q. What did Officer Kent do?

A. Helped Officer Gilford restrain Mr. Wainwright from further pushing us against the wall while the handcuffs were put on Mr. Wainwright.

Q. How was he pushing you around? Did he strike out at someone?

A. No. Like a football player going through a line.

Q. Did he try to run?

A. No, dancing from wall to wall.

Q. Did he do that because each of you were pulling on his arms?

A. He was trying to keep us from getting his arms.

Q. You pulled one way; Officer Gilford the other?

A. Yes, trying to get his arms apart.

Q. Immediately after you took his jacket off what happened?

A. His right arm was removed from the jacket and a handcuff put on. Left arm removed and he was handcuffed. He calmed down; then he was asked to use the 'phone. The handcuff was removed from his left arm and he was allowed to use the 'phone and rehandcuffed and brought to F.B.I. for processing.

Q. Were you standing next to him when he used the telephone?

A. I was standing by him.

Q. He was handcuffed to you?

A. No, I was holding the handcuff.

Q. Did he finish using the telephone?

A. Yes.

Q. Officer O'Rourke did you hang the 'phone up or did Mr. Wainwright?

A. Mr. Wainwright.

Q. Did you curse Mr. Wainwright?

A. No.

Q. Did you strike Mr. Wainwright?

A. No.

Q. You didn't strike him between the legs with your knee, did you?

A. No.

COURT:

Why didn't you strike him?

OFFICER GEORGE O'ROURKE:

A. We were trying to subdue the man, to keep from hurting him and getting ourselves hurt, as we had to get the jacket off.

ATTORNEY DAN A. SPENCER TO OFFICER GEORGE O'ROURKE:

Q. You didn't see Mr. Wainwright when he was first brought into the Police Station?

A. No.

ATTORNEY J. B. KIEFER TO OFFICER GEORGE O'ROURKE:

Q. Your testimony has been that you didn't know how long Mr. Wainwright was in the station before he was brought before you, is that correct?

A. Yes.

Q. Therefore, you wouldn't know whether or not he had made a request of someone else to use the telephone other than yourself, before he was brought to you, is that correct?

A. Yes. If he asked someone else I had no knowledge of it.

Q. To clarify your testimony, he made no request to use the telephone until after the incident, that is only insofar as in your presence, right?

A. Right.

Q. You don't know what requests, if any, were made by Mr. Wainwright before he was brought before you?

A. That is right.

Q. Do you know in what capacity Officer Kent serves?

A. Assigned to the Detective Bureau.

Q. Do you know for what purpose he was there?

A. No, sir, I had no idea.

Q. No other questions.

ATTORNEY DAN A. SPENCER TO OFFICER GEORGE O'ROURKE:

Q. Immediately after Mr. Wainwright was brought out of the Interrogation Room were you standing next to Lt. Martello?

A. No, sir I was in the booking cage.

Q. Where was the Lieutenant?

A. I cannot say.

Q. Was he there?

A. I presume he was.

Q. You don't know he was?

A. No. Where at?

Q. How long after Mr. Wainwright was brought out of the Interrogation Room into the booking

cage, did you notice Lt. Martello's presence?

A. When they proceeded to book Mr. Wainwright.

ATTORNEY DAN A. SPENCER:

I move for a directed verdict.

COURT:

Denied.

OFFICER E. BOEPPLE CALLED BY DEFENSE:

OFFICER E. BOEPPLE BEING DULY SWORN, TESTIFIED:

ATTORNEY DAN A. SPENCER: TO OFFICER BOEPPLE:

Q. Officer Boepple, do you know the defendant in this case, Stephen Wainwright?

A. Yes, I do.

ATTORNEY J. B. KIEFER:

I object.

COURT:

Under what circumstances do you know Stephen Wainwright, Officer Boepple?

OFFICER E. BOEPPLE:

I arrested the subject.

ATTORNEY DAN A. SPENCER TO OFFICER E. BOEPPLE:

Q. When did you arrest the subject?

A. October 13, 1964.

Q. After the arrest did you take him to the First District Police Station?

A. I did.

Q. Did he ask you immediately upon be taken to the Police Station, to use the telephone to contact an attorney?

A. He asked me when he would be allowed to use the telephone.

Q. What did you tell him?

A. As soon as his name was on the book.

Q. What did you do with him as soon as you brought him to the Police Station?

A. Kept him in the Interrogation Room for a period of approximately seven to ten minutes.

Q. Was anyone else being booked at the time?

A. I think there were other prisoners there. I don't know for sure.

Q. Any reason he wasn't booked immediately?

A. I was awaiting arrival of two homicide officers, who I assume would be connected with the matter eventually. I wanted to await their arrival.

Q. You suspected him of being a suspect in a murder case?

A. Correct.

Q. These two officers could have identified that murder suspect, is that correct?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Sustained.

ATTORNEY DAN A. SPENCER TO OFFICER E. BOEPPLE:

Q. You didn't allow Mr. Wainwright to use the telephone until some ten or fifteen minutes after he was brought into the station?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Sustained. This is a defense witness not a City witness.

ATTORNEY DAN A. SPENCER TO OFFICER E. BOEPPLE:

Q. How long did you keep Mr. Wainwright in interrogation before being brought out to be booked?

A. Seven to ten minutes.

Q. Why was he brought out to be booked at the time?

A. Orders of Lt. Martello.

Q. In what manner did he give these orders? What were his exact words?

A. He asked me if that man was under arrest. I said yes. He said for me to bring him out and book him.

Q. What happened then?

A. I don't know. I went to roll-call room, someone had called me back there from the Armed Service Police.

Q. Did you ever see Mr. Wainwright again that morning?

A. I don't think so, Mr. Spencer. I don't recall.

Q. No further questions.

ATTORNEY J. B. KIEFER TO OFFICER E. BOEPPLE:

Q. You are a member of the New Orleans Police Department?

A. I am.

Q. So employed on Friday, October 13, 1964?

A. I was.

Q. No other questions.

OFFICER JOHN OTTESEN, CALLED BY DEFENSE:

OFFICER JOHN OTTESEN, BEING FIRST DULY SWORN, TESTIFIED:

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. State your name please.

A. John Ottesen.

Q. What is your occupation?

A. Police patrolman assigned to the First District.

Q. Have you ever seen Mr. Wainwright before?

A. I have.

Q. When did you first see him?

A. Friday, October 13, 1964 about 12:30 AM.

Q. Did you arrest him that night?

A. I did.

Q. Did you bring him to the First District Station?

A. Correct.

Q. What did you do when you brought him to the station?

A. When we brought him to the station we brought him into the Interrogation Room; questioned him as to his name, place of birth, etc.

Q. Did he answer these questions?

A. He answered his name; where he lived, and said he was a law student. He didn't want to tell us any other information.

Q. Did he ask to use the telephone?

A. I don't know.

Q. You don't recall whether or not he asked you?

A. I don't remember.

COURT:

He may have?

OFFICER JOHN OTTESEN:

It's possible.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. How long was he in the Interrogation Room?

A. Ten or fifteen minutes, and we telephoned for the Lieutenant.

Q. Where was he?

A. Out in the car.

Q. What did you call him for?

A. We had a possible suspect in a murder case. We needed someone of higher knowledge to question the subject. We also notified the Detective Bureau.

Q. Why did you notify the Detective Bureau?

A. They had specifically asked us to check the vicinity of the French Quarter for a suspect wanted in a murder case.

Q. Why did you call them?

A. Suspect fitted the description of the wanted subject.

Q. Did you call them to send someone?

A. They had a better knowledge of the person than we had.

Q. What happened when Lt. Martello arrived?

A. The Lieutenant asked him a few questions; he said his name; where he lived; and that he was a law student.

COURT:

The Court at this time is offering an instanta subpoena to Mr. Spencer if he wishes to have these two individuals with the Detective Bureau available so that they can answer if they knew one Johnnie McTaylor.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. What happened then after you called the De-

tective Bureau, and Lt. Martello arrived, what did you do, did you leave the prisoner, or did you stay there while he was booked?

COURT:

Subsequent to the calls to Lt. Martello and the Detectives' office, what did you do, Officer Ottesen?

OFFICER JOHN OTTESEN:

Lt. Martello arrived and he questioned Wainwright, and wanted Mr. Wainwright to remove his jacket, because this was a vital incident in his identification, as to whether he was Johnnie McTaylor or not.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Did you ever search Mr. Wainwright?

A. Yes, when we first interrogated the suspect.

Q. Did he have any weapons on him?

A. No.

Q. Were you certain he had no weapons on him?

A. We gave him a quick frisk — a pat down.

COURT:

Were you reasonably certain he didn't have any weapons on him based upon your frisk?

OFFICER JOHN OTTESEN:

I was satisfied that he didn't have a weapon.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Were you present in the First District Station when he was booked?

A. Yes.

Q. Had his jacket been taken off of him when he was booked?

A. He was asked to remove his jacket by Lt. Martello.

COURT:

Prior to the booking, was his jacket on or not?

OFFICER JOHN OTTESEN:

He had his jacket on.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Did he have his jacket on at the time that he was booked?

A. I don't remember.

Q. Do you remember his ever having asked to make a telephone call after he was booked?

DEFENDANT STEPHEN WAINWRIGHT TO THE COURT:

This officer here (indicating Officer O'Rourke) has been nodding his head.

ATTORNEY J. B. KIEFER:

If this officer is coaching this witness . . .

ATTORNEY DAN A. SPENCER:

The Court's instructions have been violated.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Was Officer O'Rourke making signals to you?

A. Not to my knowledge.

Q. Did you see him?

A. You were standing right where he was seated.

COURT:

Have any of your statements been influenced by any one in this Court Room?

OFFICER JOHN OTTESEN:

No, sir.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Do you recall Mr. Wainwright either before, or

after being booked, asking to use the telephone?

A. He might have. We explained he had to be booked and then use the 'phone.

Q. Why did he have to be booked before using the telephone?

A. Procedure.

Q. Is there a sign over there in the District Station?

A. Yes.

Q. Do you remember what it says?

A. I know they are allowed to use the telephone. Every instance I ever handled they were booked and then allowed to use the 'phone.

Q. In this case defendant was interrogated before he was booked? He wasn't booked immediately after being brought into the Station, is that not true?

ATTORNEY J. B. KIEFER:

I object.

COURT:

Answer the question.

OFFICER JOHN OTTESEN:

He was interrogated.

ATTORNEY DAN A. SPENCER TO OFFICER JOHN OTTESEN:

Q. Before being booked?

A. Correct.

Q. Before being allowed to make a telephone call?

A. We asked him the same questions that we asked him out on the street.

Q. You were interrogating him about a possible murder case?

A. No. We wanted to establish his place of birth.

Q. You didn't ask him if he was Johnnie McTaylor?

A. I don't believe we ever asked him out right. I didn't ask him.

Q. You did interrogate him about possible murder suspect?

A. Correct.

Q. Before you booked him?

A. Yes we did.

Q. No further questions.

ATTORNEY J. B. KIEFER:

No questions.

STEPHEN R. WAINWRIGHT, DEFENDANT, BEING DULY SWORN, TESTIFIED:

ATTORNEY DAN A. SPENCER TO STEPHEN R. WAINWRIGHT:

Q. State your name.

A. Stephen R. Wainwright.

Q. What is your occupation?

A. Graduate law student working for a lawyer in Massachusetts.

Q. For whom do you work?

A. George L. Wainwright.

Q. Is he related to you?

A. He is my father.

Q. On October 13th., 1964, what was your occupation?

A. Student of Law at Tulane University here in New Orleans.

Q. Have you since graduated from Tulane?

A. Yes, I have.

Q. You now have a Law Degree?

A. I have.

Q. Do you have any other College Degrees?
A. A Bachelor of Arts in Psychology from Wesleyan University.

Q. Do you have any previous convictions?
A. None.

DECISION OF THE COURT

I find the defendant guilty and sentence him to pay a fine of $25.00 or serve thirty days in jail on each charge, and I am suspending same.

ATTORNEY DAN A. SPENCER:
I wish to file a Motion for an Appeal.

COURT:
Granted.

CERTIFICATE

I hereby certify the foregoing to be a true and correct copy of the transcript of testimony and notes of evidence in the above numbered and entitled cause.

New Orleans, Louisiana, July 30, 1965.

/s/ ANDREW G. BUCARO
ANDREW G. BUCARO,
JUDGE.

/s/ GERRY HEATON
GERRY HEATON,
STENOGRAPHER.

APPENDIX C

OFFICE OF THE DISTRICT ATTORNEY
STATE OF LOUISIANA
PARISH OF ORLEANS

OCTOBER 16, 1964

STATEMENT OF:

DAN A. SPENCER, W/M, Age 25 years.

RESIDING:

829 Ursuline Street, Apt. 3, New Orleans, La.

RE:

Complaint against Lt. Martello, and Ptn. Wilson of the New Orleans Police Department.

STATEMENT

I am an attorney and I share an apartment with Mr. Stephen Wainwright. Shortly after 1:00 A.M., Tuesday, October 13, 1964, about 1/2 hour after Mr. Wainwright had left our residence, I received a telephone call from him and he informed me that he had been picked up by the police and beaten, and asked me to come to the First District Police Station and get him out of jail. I immediately proceeded to the First District Police Station, asked the officer on duty at the desk whether Mr. Wainwright was being held there, and he informed me that Mr. Wainwright had been arrested and had been taken to the Bureau of Identification of the Police Department. I asked that Mr. Wainwright be brought back immediately so that I could confer with him and identified myself as an attorney representing Mr. Wainwright. Police officers stated that they would not bring him back at that time and that it might be several hours before they would bring him back. I explained to them that I had been told that Mr. Wainwright

had been beaten and that as his attorney I had a right to see him immediately and if necessary, to see that he got proper medical attention. A Lt. Martello informed me that he was one of the arresting officers and ordered me not to get smart with him. At my insistance on seeing Mr. Wainwright immediately, and my right to do so, another police officer stated that I was "a real smart-aleck". When I continued to protest their holding Mr. Wainwright, without allowing his counsel to see him, I was ordered from the police station. I refused to leave the police station and was then arrested by the police and charged by Lt. Martello and Ptn. Wilson with reviling the police and refusing to move on. I was refused the right to make a telephone call until after I had been searched and booked. I was then allowed to call Judge Julian Samuel of the Fourth Circuit Court of Appeal of Louisiana, and Judge Samuel informed the police officers in my presence that he was paroling me. I was then taken to a cell designed for 4 prisoners which already held 6 prisoners, and was held there for approximately 1 hour. Immediately upon their releasing me sometime between 2:30 A.M. and 3:00 A.M. I called Judge Bossetta of the Municipal Court of New Orleans and he stated that he was going to immediately parole Mr. Wainwright. The police nevertheless refused to release him until sometime between 4:30 and 4:45 A.M. Tuesday morning although I told them that Mr. Wainwright had been paroled. Immediately after Mr. Wainwright's release I drove him to Touro Infirmary where he was examined by a physician for the numerous injuries he received in the beating by the police.

/s/ DAN A. SPENCER

DAN A. SPENCER

WITNESSED:

/s/ LORRAINE G. LE BOUEF

STATE OF LOUISIANA
PARISH OF ORLEANS

OCTOBER 16, 1964

STATEMENT OF:
STEPHEN R. WAINWRIGHT

RESIDING AT:
829 URSULINE ST., APT. 3

RE:
AFFIDAVIT NO. J-7405-64

At about 12:30 A.M. the 13th of October, 1964, I left my apartment on Ursuline Street after studying for about six hours and walked down Bourbon Street. I had gotten about three or four blocks when a patrol car stopped, backed up and the officers got out and stopped me. They asked me where I was going and I said I was going to get something to eat. They asked me my name and I told them. They asked me where I lived and I told them. They asked me where I worked and I said I did not work, that I was a student at Tulane University. Then they asked me for identification and I said I did not have any, that it was at my apartment. They at this time said they were looking for a man and that I looked like the man. They ordered me to remove my jacket and be inspected to see if I had a tatoo on my back. I refused. Upon my refusal, Officer Boepple returned to the patrol car and got a small piece of paper on which I presumed was the description of the wanted man. He compared it with me and again asserted his demand that I remove my clothing. I said, "I have given you the necessary information—my name, my address and where I go to school. I refuse to remove my clothing." He said, "All right, you are coming with us." I asked him if I was under arrest and he said yes. I asked

what was I under arrest for and he said vagrancy by loitering. I asked if I could go to my apartment to get my identification. I then got in the front seat of their car and they told me to get in the back seat and we drove off. Instead of taking me to my apartment to get my identification, they took me to the First District Police Station. When I realized they were not giving me an opportunity to get my identification I said, "Of all the stupid —. I did not finish the sentence. The officers immediately stopped the car and said, "What did you say?" I did not answer. Officer Boepple turned to Officer Otteson and said, "Reviling the police." After this I remained completely silent until we reached the First District, whereupon I was put in the Interrogation Room. Again I asked was I under arrest and they said yes I was. I then demanded the right to call my attorney. They refused to let me out of the room and told me I could not leave the room until I took my clothes off. I re-asserted my right to use the phone and they said I had no right to use the phone until after I had been booked. They also said that they were waiting for two detectives to arrive who could identify this mystery man by sight. Then we waited for about twenty minutes, whereupon I was brought out of the Interrogation Room where Lt. Martello was. He said, "So, the S.O.B. refused to take his clothes off. Bring the M.F. over here and we will take them off for him." I was then brought in front of the booking desk and six officers pounced upon me, stretched my arms out, twisted my wrists, put a handcuff on my right hand so tight that it cut off the circulation and while bent over, Officer O'Rourke came around in front of me and kneed me in the groin. They then took off my clothes and examined my back. Then I was booked. I requested that they undo the handcuff and they refused. Not until the booking process was over did they finally loosen the cuff. At this time I

was permitted to make one phone call. I called my attorney and weeping told him to get to the First Police Police Station as soon as possible. As soon as I hung up the phone, I was immediately taken across town where I was placed in a basement cell. I requested medical attention but was told that I would be able to see a doctor when they were through with me. Approximately 2 hours later they brought me upstairs, photographed me and fingerprinted me. After this I was returned to the paddy wagon and driven back to the First District where I arrived about 4:30 A.M. My attorney was waiting. They returned my torn clothing and gave me an affidavit. I informed the officers present of my injuries and then left the station to go to the Touro Infirmary where I was treated by Dr. Levy.

/s/ STEPHEN R. WAINWRIGHT

STEPHEN R. WAINWRIGHT

APPENDIX D

January 19, 1965

Mr. Dan A. Spencer
Room 1041
Maison Blanche Building
New Orleans, La.

Dear Mr. Spencer:

Your Appeal in Case No. C-80504, City of New Orleans versus Dan Arthur Spencer, is now ready to be filed in the Criminal District Court.

In accordance with Ordinance 828 MCS, Section 40-41, the charge of $1.00 per page for each page of the transcript amounts to $37.00 for 37 pages. You have previously posted the $10.00 deposit as set out in Section 40-40 of said Ordinance and, under Section 40-41 of the said Ordinance, the amount above stated now due must be paid within five judicial days from the date of this letter. A failure so to do shall operate as a dismissal of the appeal as provided by law.

Yours very truly,

ARTHUR J. BOE
Clerk, Municipal Courts

AJB:dbf

January 19, 1965

Mr. Edward A. Haggerty, Clerk
Criminal District Court
Tulane and Broad Streets
New Orleans, La.

Dear Sir:

Enclosed herewith please find Appeal in the case of the City of New Orleans versus Dan Arthur Spencer, Affidavit No. C-80504:

Transcript	— Page 1 through 37
Affidavits (2)	— Page 38 through 39
Propositions of Law	— Page 40 through 42
Motion for Appeal	— Page 43
Appeal Bail Bond	— Page 44
Certified Copy of Ordinance 828 MCS, Section 49-7	— Page 45
Certified Copy of Ordinance 828 MCS, Section 42-90	— Page 46

Yours very truly,

ARTHUR J. BOE
Clerk, Municipal Courts

AJB:dbf

CITY OF NEW ORLEANS

VS.

DAN ARTHUR SPENCER
829 URSULINE ST.
NEW ORLEANS, LA.

AFFIDAVIT NO. C-80504

CHARGE: VIOLATION OF ORDINANCE NO. 828 M.C.S., SECTION 49-7, RELATIVE TO REVILING THE POLICE; VIOLATION OF ORDINANCE NO. 828 M.C.S., SECTION 42-90, RELATIVE TO REFUSING TO MOVE ON.

TRANSCRIPT OF TESTIMONY AND NOTES OF EVIDENCE IN THE ABOVE NUMBERED AND ENTITLED CAUSE; SAME BEING TAKEN IN OPEN COURT BEFORE THE HONORABLE JOSEPH R. BOSSETTA, JUDGE, MUNICIPAL COURT, SECTION C, ON DECEMBER 4, 1964, IN BEHALF OF THE CITY AND THE ACCUSED.

CITY WITNESSES:
PTN. F. WILSON, N.O.P.D.
LT. F. MARTELLO, N.O.P.D.

DEFENSE WITNESSES:
MR. STEVE WAINWRIGHT

DEFENSE ATTORNEY:
MR. DAN ARTHUR SPENCER

PROSECUTING ATTORNEY
MR. J. B. KIEFER

Reported by:
Mrs. Dorothy B. Ford
Stenographer

PLEA OF NOT GUILTY ENTERED

COURT:

Let the record show that on December 2, 1964, there was filed on behalf of the defense motion for subpoena ducis tecum in which it was requested by the defense, through his counsel, that all of the investigative reports of the Police Bureau of Investigation, including statements by any persons related thereto, of the arrest of the defendant in the captioned matter on the 13th of October, 1964, by members of the New Orleans Police Department should be made available to the defendant. Is there any objection from the city prosecutor?

ATTY. KIEFER:

The City objects to the motion for the subpoena ducis tecum.

ATTY. MURRAY:

My name is Murray, and I am representing Mr. Spencer, but he is also an attorney and has done a good deal of preparation himself so he will handle this procedure.

DEFENDANT:

This motion is based solely on the case of Brady versus Maryland, 1963, which states that it is a denial of due process under the Fourteenth Amendment of the United States Constitution for the State not to make available to the defendant any evidence it has relative to the case which may prove favorable to the defendant. It is obvious that the defendant cannot find out whatever evidence might be favorable to him unless he knows what the evidence is going to be. I would like to provide the Court with the citation to that case. It is Brady versus the State of Maryland, 83 Supreme Court, 1194. It is my belief that there is in possession of the Police Department statements by the officers.

COURT:

Do you have a memorandum that was ordered by the Court?

DEFENDANT:

If the Court is going to grant the motion I can see no alternative but to continue this case.

COURT:

But the Court did order a memorandum, to which you agreed?

DEFENDANT:

I would be prepared to waive this motion and my rights in that regard.

COURT:

You wish to withdraw your motion now, or do you want a ruling?

DEFENDANT:

I would like a ruling on it.

COURT:

The Court would like for its orders to be obeyed. I would like to have the memorandum and the court request — the memorandum to make sure that every possible avenue was explored to protect your rights.

DEFENDANT:

This identical motion was denied yesterday in another section of this Court.

COURT:

I am only responsible for the verdicts I render, and I offered you an opportunity to file everything possible on your behalf.

DEFENDANT:

I will at this time withdraw that motion and I will elicit the desired testimony.

COURT:

Let the motion previously filed be withdrawn at the request of counsel.

DEFENDANT:

I can't tell from the affidavit who filed the affidavit.

COURT:

Let the record show that the accused is Dan Arthur Spencer, of 829 Ursuline Street. Is that correct?

DEFENDANT:

That's correct.

COURT:

That on Tuesday, the 13th of October, 1964, at about 1:50 A. M., at the First District Police Station within the jurisdiction of this Court and the confines of the City of New Orleans, the accused did then and there wilfully violate Ordinance No. 828 MCS, Section 49-7, relative to reviling the police.

DEFENDANT:

Section 49-7 does not have such a title as reviling the police.

COURT:

All motions should be in writing.

DEFENDANT:

I would simply like to know what I am charged with.

COURT:

According to the affidavit you are charged with reviling the police.

DEFENDANT:

There is no ordinance reviling the police in the Code of the City of New Orleans. Number 49-7 states cursing, etc.

COURT:

Are you referring to the black print that heads the ordinance?

COURT:

Are you referring to the black print that heads the ordinance?

DEFENDANT:

Yes, the black print which heads the ordinance.

COURT:

We all know that the black print is only indicative and the responsibility lies only in the body of the ordinance.

DEFENDANT:

I think there is a provision in the Louisiana Constitution that requires the title to be indicative of anything contained in the body, and I don't think the word "cursing" necessarily includes reviling.

COURT:

You are concerned with the fact that you as the defendant are entitled to know the nature and extent of which you are being charged, is that correct?

DEFENDANT:

Yes.

COURT:

You are being charged with Section 49-7 concerning or relative to the reviling of the police or that portion of it.

DEFENDANT:

I would not be charged with cursing the police, but reviling the police?

COURT:

Yes.

DEFENDANT:

I will stand on what you have stated and file no formal pleadings.

DEFENDANT:

As to the other offense, under 42-90, refusing to move on, I don't see the relevancy of refusing to move on under the title of that statute. I don't believe the title of the statute is indicative of making it unlawful to refuse to move on.

COURT:

If you desire to file special pleadings I will allow you to withdraw your former plea of not guilty and allow you a reasonable amount of time to file special pleadings if you so desire, but they must be in writing.

DEFENDANT:

I am not requesting a continuance in this case to file special pleadings. The only purpose of my argument at the moment is to determine whether or not this affidavit is going to be limited to the exact offense which is charged in the affidavit.

COURT:

All affidavits are limited to the exact offense charged.

DEFENDANT:

Would that limitation also limit the proof to that portion of the ordinance? In the charge of reviling the police is the charge going to be limited to reviling the police or be allowed to go into other matters in that ordinance, and as to refusing to move on are they going to be allowed to prove other things than the refusing to move on?

COURT:

The Court certainly is not going to admit any

evidence that the Criminal Code of Procedure says is not admissable.

DEFENDANT:

We are ready for trial at this time.

ATTY. KIEFER:

Let the record reflect that there is an attorney of record assisting and representing counsel.

PTN. F. WILSON, DULY SWORN, TESTIFIED:

ATTY. KIEFER TO PTN. WILSON:

Q. Please state your name.

A. Patrolman Frank Wilson, New Orleans Police Department.

Q. You were so employed on the 13th of October, 1964?

A. I was.

Q. Do you recall an incident involving Dan Spencer, the defendant in this case, which occurred on that night?

A. Yes, I do.

Q. Where did that incident occur?

A. In the First District Police Station.

Q. In what capacity were you in the First District Police Station!

A. On that morning I was working in the capacity of acting Desk Sergeant.

Q. At what time was this?

A. This was about 1:45 A. M.

Q. This was in the City of New Orleans?

A. Yes.

Q. Please relate to the Court what occurred at that time while you were on duty.

A. While working as Desk Sergeant that morning I noticed the defendant before the bar standing near the booking cage. I asked if I could

help him and he inquired about a subject previously arrested, Wainwright. He asked what were the charges against Wainwright. I went to the arrest book and read off the charges against Mr. Wainwright and related this information to Mr. Spencer. At this time Mr. Spencer said, "What"? and I again read the three charges off to him. At that time Mr. Spencer stated that he shared an apartment with Mr. Wainwright and he felt Mr. Wainwright would do nothing to warrant his being arrested for those three charges, which were vagrancy by loitering reviling the police and resisting arrest. I then informed Mr. Spencer that I was not the arresting officer, and with this he cut me off and said, "Well, who did arrest Wainwright"? Lieutenant Martello, who had been standing just in back of me and who was in hearing distance of the conversation between me and Mr. Spencer, joined in the conversation and said, "I was one of the officers instrumental in arresting Wainwright", and at that time Mr. Spencer again made the statement that Mr. Wainwright was of good character and would do nothing to warrant any such arrest. Lieutenant Martello then informed Mr. Spencer that he was not going to discuss the case, and that if Mr. Spencer was interested in the case he should come to court that night at the trial. Mr. Spencer then said, "Look, buddy", and with that Lieutenant Martello broke off and said, "I'm not your buddy, and if you want to find out anything else about the case you can come to court that night". Mr. Spencer then turned to me and asked if he could see Mr. Wainwright. I informed him that Mr. Wainwright was not at the station at that time, that he had been brought to the Bureau of Identification to be photographed and fingerprinted. With this Mr. Spencer in a loud tone said, "Fingerprinted and photo-

graphed? What for"? And I informed him that the fingerprinting and photographing was a part of the booking procedure. He then asked how long would Mr. Wainwright be at the Bureau of Identification, and I stated to him that it would probably take anywhere from twenty minutes to an hour, and he asked the reason for this long time for a man to be processed, and I explained to him that the people that were brought up to the Bureau of Identification to be processed were processed as fast as they could. Mr. Spencer then asked again who were the arresting officers, and again he was notified that it was the Lieutenant and two Patrolmen. He took a piece of paper out of his pocket and jotted down these three names. Again he asked when would Wainwright be brought back to the District Station, and I informed him it would probably take an hour. He then asked me, "Will that smart Lieutenant be here when I come back"? and I told him probably the Lieutenant would be at the station, and I asked him would he leave. He then said, "No, I know how you cops operate. I know you're going to keep Wainwright here for about a week", and I told him that if Mr. Wainwright was paroled or had posted bond upon his return he would be released. He then asked me how could he go about getting Mr. Wainwright out. I then informed him it would be either through a seventy-five dollar cash bond, twenty-five dollars for each charge, or through an elected official. Then Mr. Spencer kept bringing up the fact that Mr. Wainwright was of good character and he was unjustly arrested. Several times I had asked him to leave the station. It seemed that by his being there and the Lieutenant being there they were more or less trying to argue between each other. I had to ask Mr. Spencer two or three times to leave. When

he refused to leave I informed him if he didn't leave he would also be arrested. He then said, "What kind of charge are you going to dream up for me"? I then took him by the arm, placed him in the booking cage and charged him accordingly.

Q. What did you charge him with?

A. I charged him with reviling the police and refusing to move on.

Q. Do you know what Mr. Spencer's occupation is?

DEFENDANT:

Objection. That is immaterial and irrelevant to any matter before this Court.

COURT:

Objection sustained.

ATTY. KIEFER:

Q. Did Mr. Spencer ever represent himself to you to be an attorney?

DEFENDANT:

Objection. That is immaterial and irrelevant. I don't see the relevancy of whether or not I represented myself as an attorney to this man on the night in question. The fact that I was an attorney may be material, but the fact whether or not I represented myself to him as one is immaterial.

COURT:

Objection overruled. The Court feels that the representations made by the defendant certainly has a bearing and is very material.

DEFENDANT:

May I ask the Court to tell me which of the two charges this testimony is material to before I made my objections?

COURT:

Which of the two charges that this is material to?

DEFENDANT:

Yes.

COURT:

Which did you object to?

DEFENDANT:

As to both of them.

COURT:

You didn't state that you did.

DEFENDANT:

I think it is immaterial to either one of them.

COURT:

You didn't state so.

DEFENDANT:

I will state so now that I think it is immaterial to either of the charges to any matter before this court.

COURT:

Formally make your objections.

DEFENDANT:

I object to the question as to whether or not I represented myself as an attorney at law on the night in question on the grounds that it is immaterial and irrelevant to the two charges pending against me before this court at this moment.

COURT:

Objection overruled in both instances.

DEFENDANT:

To the ruling of the Court I wish to note my reservations forming a bill of exceptions to the ruling of the Court on my objections, on the

grounds that the testimony sought to be elicited is immaterial and irrelevant to any matter before this Court.

ATTY. KIEFER:

Q. Please answer the question.

A. No.

Q. Did you know him to be an attorney?

DEFENDANT:

I object on the grounds that it is immaterial, irrelevant and leading. It is immaterial and irrelevant to either of the charges.

COURT:

Sustained:

ATTY. KIEFER:

Q. How was Mr. Spencer attired or dressed that night?

DEFENDANT:

Objection, on the grounds that it is immaterial and irrelevant to either of the charges.

COURT:

Sustained.

ATTY. KIEFER:

Would you please tell the court the demeanor of the defendant?

DEFENDANT:

Objection. The testimony sought to be elicited is immaterial and irrelevant. It seeks an opinion of the witness in a matter in which he has not been qualified as an expert.

COURT:

The Court has to take cognizance of the fact that the word "demeanor" means actions of the party. Is that what you meant?

ATTY. KIEFER:

His actions and his behaviour.

DEFENDANT:

I think he can ask what my actions were. He asked for demeanor. I think that what he is seeking is testimony as to a frame of mind.

COURT:

Objection overruled.

DEFENDANT:

To the ruling of the Court I should like to reserve a formal bill of exceptions on the grounds that the testimony sought to be elicited is immaterial, irrelevant and incompetent.

ATTY. KIEFER:

Q. You will please answer the question.

A. It was very disrespectful.

Q. In what respect?

A. He acted as though he was taking the charges against Mr. Wainwright as more or less a personal fight between him and the police.

DEFENDANT:

Objection to that testimony on the grounds that it is immaterial and irrelevant to any charge against me at this time.

COURT:

What are you objecting to?

DEFENDANT:

He is testifying as to what he thinks my attitude towards the police was, and I fail to see the relevancy of that.

COURT:

He is testifying as to what he personally saw. It is up to me to believe or disbelieve him. Objection sustained.

ATTY. KIEFER:

Q. Did he speak to you in a courteous manner?

DEFENDANT:

Objection.

COURT:

Overruled.

DEFENDANT:

To the ruling of the Court I wish to reserve a formal bill of exceptions on the grounds that the testimony sought to be elicited is irrelevant and immaterial.

ATTY. KIEFER:

Q. Please answer the question.

A. As Mr. Spencer was holding conversation with me he was also arguing and asking me different questions and I would answer the questions. He would at times raise his voice and become real loud and real offensive towards me, and then other times he would be real calm. Then he would direct a question or a statement to Lieutenant Martello in a loud voice or real belligerent, and when he asked me "Is that smart Lieutenant going to be here when I return"?, "I know how you cops operate", and "What kind of charge are you going to dream up for me?", each time he would ask these questions and make these statements it would be in a loud tone, a real mean tone, a disrespectful tone.

Q. When you asked him to move on what did he answer?

A. He would just avoid the whole statement. Several times I said, "Mister, you're going to get in trouble. Why don't you leave?", and he would laugh and shake his head like he was not going to do it. He wouldn't make any statement whatsoever, like "No, I'm not", but at one time I said, "You're going to get in

trouble", he said, "I know what kind of charge you're going to dream up for me. I know the way you cops operate".

ATTY. KIEFER:

Q. Then what did you do at that point?

A. I then went around the booking cage, took him by the arm and walked him to the booking cage.

Q. And then what did you do?

A. I then booked him.

Q. What is the procedure that you follow for booking?

A. The procedure is to put the item number on the arrest book and the charges against the subject and the location of the arrest, and then the arresting officers. After that is completed the information about the subject is filed in the book — name, address, age, etc.

Q. What was his behaviour during this time?

A. He just stood before the booking cage smiling.

Q. Did he ask you any questions?

A. No.

Q. Was he cooperative?

A. Yes, I would say he was cooperative.

Q. At that point he was?

A. Yes.

ATTY. KIEFER:

I have no other questions of this witness.

DEFENDANT:

I have no questions for this witness at this time. I would like to reserve my right to recall him later if it appears necessary.

LIEUTENANT MARTELLO, DULY SWORN, TESTIFIED:

ATTY. KIEFER TO LT. MARTELLO:

Q. State your name.

A. Frank L. Martello.

Q. You are a member of the New Orleans Police Department?

A. Yes.

Q. You were so employed on October 13, 1964?

A. Yes.

Q. At approximately one o'clock in the morning?

A. Yes.

Q. In what capacity were you serving at that time?

A. Lieutenant of Police. Platoon commander assigned to the First District on the last watch, eleven to seven.

Q. Do you recall an incident involving the defendant which occurred at that time and in that place?

A. Yes, I do.

Q. That place is in the City of New Orleans?

A. That's correct.

Q. Please tell the Court what that incident was.

A. We were in the District Station and this arrested person here before the Court came into the station, and he inquired about the arrest of one Stephen Wainwright. He spoke to Officer Frank Wilson. He wanted to know what he was charged with. The officer explained to him that he was charged with vagrancy, reviling the police and resisting an officer. He inquired as to how the man could be released from custody. It was explained to him by Officer Frank Wilson that he could post seventy-five dollars cash bond, or have an elected official or judge have him paroled. At this time he stated he wanted the names of the arresting officers. He said that he lived with this boy at 829 Ursuline Street and it was a friend of his. I gave him the name of the officers,

Officers Boepple and Oddison. He said he knew this boy. He said, "I live with him and I know he wouldn't do anything like this". He again asked if a civil judge or circuit judge could get him paroled, and we informed him that he could. I think it was Judge Julian Samuels he said. He asked the names of the officers again and I told him I had given them to him, and he said he wanted them again. I gave them to him again, and he wrote them down. He says, "I know how you smart cops operate". I told him, "Just a minute. I don't think you understand the circumstances surrounding this arrest", and with that he became enraged. He became emotional. He pointed his finger at me in this manner, and he says, "Look, buddy, let me tell you", and that's about as far as he got because I stopped him. I said, "Look, just a minute. I'm not your buddy. You're in a police station. I'm a Lieutenant of Police, and you will address me accordingly", and I said, "Get out of here". I did this because I didn't want to arrest the man. I figured it would be better to let him leave the station. Then he made no effort to leave the station. He said, "How long are you going to keep him back there"? We explained to him that there is a procedure in the department that we take a prisoner and have him mugged and fingerprinted, brought to the Bureau of Identification and as soon as this procedure is completed he is returned to the station. He again stated "I guess you guys will keep him in jail a week". We were very busy at the district with a lot of duties to perform. He says, "Will that smart Lieutenant be there when I come back"? Officer Wilson walked over to him and says, "You'd better leave. The Lieutenant told you to leave. Why don't you leave"? He again made no effort to leave the station, and he says, "Yeah, you guys, you'll dream up some

charges for me". After being told two or three times to leave the station and he showed no indication of leaving, we arrested him and charged him with refusing to move on and reviling the police. At this time a call came over of a burglary, and I left the station and went on the call.

Q. How long were you gone from the station?

A. I was out approximately an hour and a half, or so. When I came back to the station I inquired if Mr. Wainwright had returned from the Bureau of Identification and they said he hadn't, and I made a personal call to the B. of I. technician and he informed me he just came back from a photograph job on this same burglary and he had to take fingerprints.

DEFENDANT:

Objection. I fail to see the relevancy. The testimony about who he spoke to and what the other officer told him, I think that's hearsay.

COURT:

Sustained.

ATTY. KIEFER:

Q. Did you know the occupation of Mr. Spencer at that time?

A. No.

Q. In what way was he dressed?

DEFENDANT:

Objection, on the grounds that the question seeks to elicit information which is immaterial and irrelevant.

COURT:

Sustained.

ATTY. KIEFER:

Q. Did Mr. Spencer ever represent himself to you to be an attorney?

DEFENDANT:

Objection, on the grounds that it is immaterial and irrelevant.

COURT:

Objection overruled.

ATTY. KIEFER:

Q. Please answer the question.

A. No, he did not.

Q. In which way was he attired? In which way was he dressed?

DEFENDANT:

You just sustained an objection to the question as to how I was dressed. I renew my objection as to how I was dressed.

COURT:

Sustained.

ATTY. KIEFER:

Q. How long have you been a member of the New Orleans Police Department?

DEFENDANT:

Objection. The testimony sought to be elicited is immaterial and irrelevant to the charges before the Court.

COURT:

Why is it immaterial and irrelevant?

DEFENDANT:

I can't see any relevancy because the length of time that the witness has been a member of the New Orleans Police Force does not tend to prove the defendant in this case is guilty of either of the charges made against him.

COURT:

Objection overruled.

DEFENDANT:

To the ruling of the Court I will reserve a bill of exceptions on the grounds that the testimony sought to be elicited is immaterial and irrelevant in the matter before this Court.

ATTY. KIEFER:

Q. Please answer the question.

A. A little over sixteen years.

Q. Do you like being called "a smart cop"?

DEFENDANT:

Objection. That question seeks to elicit testimony which is irrelevant and immaterial. How the witness feels about being called a smart cop does not tend to prove the defendant is guilty.

COURT:

Sustained.

ATTY. KIEFER:

Q. Do you feel that the word "cop" is insulting?

DEFENDANT:

Objection. The question seeks to elicit testimony which is immaterial and irrelevant.

COURT:

Sustained.

ATTY. KIEFER:

Q. Do you feel that the word "cop" is insulting to you?

DEFENDANT:

Objection, on the grounds that it is immaterial and irrelevant, and seeks an opinion of the witness as to a matter on which he is not qualified as an expert.

COURT:

Sustained.

ATTY. KIEFER:

Q. What is the manner in which you were addressed by the defendant on that night?

A. It was very sarcastically. It was very downgrading and abusive towards a police officer who was attempting to be reasonable.

Q. In which respect?

A. In the manner in which he made these remarks, the tone of voice, the belligerent manner he directed his finger at me — not in a menacing manner, but in a directing manner and loud tone of voice.

ATTY. KIEFER:

I have no other questions of this witness.

DEFENDANT TO LT. MARTELLO:

Q. Do you know if it is unlawful to criticize a police officer?

ATTY. KIEFER:

Objection. That is a ruling for the Court to make.

COURT:

Sustained.

DEFENDANT:

Q. Is the fact that you were criticized on this night the basis of your charge of reviling the police?

CITY ATTY.

Objection. I don't see where it is material to the charges against this defendant.

DEFENDANT:

I think the materiality and relevancy of the question are obvious.

ATTY. KIEFER:

The Police Department represents the entire community, and they are in this case as the City versus the defendant, not in any individ-

ual capacity, and the police officer acted in an agency capacity of this community, and he asked for a personal reflection from this particular witness.

DEFENDANT:

That is three fourths of this man's testimony is as to the fact that he feels like he was criticized that night.

COURT:

I will allow the question.

DEFENDANT:

Q. Is the criticism which you claim was directed at you the basis of the charge against me of reviling the police?

A. I feel that the criticism or the remarks passed in this particular case was a reflection on the entire police department, for the men under my command who I demand respect from and who I demand that they perform in a proper and professional manner, and was a reflection upon the community in its entirety.

DEFENDANT:

I have no further questions. I would like to reserve the right to call him back later.

ATTY. KIEFER:

That is the City's case, except for rebuttal.

DEFENDANT:

Will the Court take judicial notice of the fact that the defendant in this case is an attorney at law and that he represents Steve Wainwright in another section of this Court as an attorney?

ATTY. KIEFER:

I object, because I fail to see any connection between the two cases at this particular time. I have previously made a motion to consolidate and the position was taken by counsel for the

defendant that the cases had nothing to do with each other.

COURT:

I don't understand the nature of your request.

DEFENDANT:

I am seeking to establish the fact that I did have legitimate business in the police station on that night by the fact that I represented somebody that had been arrested.

COURT:

You have to establish that by fact.

DEFENDANT:

I was asking the court to take judicial notice of it.

COURT TO ATTY. KIEFER:

Would you stipulate that he represented him on that that night?

ATTY. KIEFER:

I refuse to stipulate that he represented him on that particular night, and I don't think you did on that particular night, unless when you take the stand you testify that he called you on that particular night and engaged you as an attorney. I won't stipulate to that.

DEFENDANT:

I would like to call Stephen Wainwright to the stand.

DEFENSE WITNESS, STEPHEN WAINWRIGHT, DULY SWORN, TESTIFIED:

DEFENDANT TO MR. WAINWRIGHT:

Q. What is your name?

A. Stephen Wainwright.

Q. Do you know me?

A. I do.

Q. Do you know my name?
A. Dan Arthur Spencer.
Q. What is my occupation?
A. An attorney at law.
Q. Do you know what my occupation was on the night of October 13th.
A. I do.
Q. What was it?
A. You were an attorney at law.
Q. Were you arrested and charged at the First District Police Station on the night of October 13, 1964?
A. I was.
Q. Did you on that night call me and ask me to come and get you out of jail?
A. I did.
Q. Did I agree to do so?
A. You did.

COURT:

For what purpose are you asking this gentleman whether or not you are an attorney at law?

DEFENDANT:

It was my contention that what the police thought or did not think is immaterial, but what I was is material.

COURT:

Is this man testifying as to whether or not you are an attorney or whether he feels that you are? Is he testifying for the Supreme Court or the Bar Association? To the best of his personal knowledge you are an attorney?

DEFENDANT:

I am trying to establish the fact that I had legitimate business in the police station on that

night by the fact that I represent him and he had been arrested, booked, brought in and incarcerated.

ATTY. KIEFER:

I object, unless they put the witness outside. He is putting word after word into the witness's mouth.

ATTY. MURRAY:

It has been stipulated by the counsel for both sides that since August 26, 1964, Dan Spencer has been an attorney at law qualified to practice in the State of Louisiana.

ATTY. KIEFER:

That's correct.

DEFENDANT:

We have no further questions, and we rest our case.

ATTY. KIEFER TO MR. WAINWRIGHT:

Q. How are you employed?

A. I am a student.

DEFENDANT:

Objection. I fail to see the materiality of this testimony.

COURT:

You put this witness on the stand.

DEFENDANT:

Yes, but I didn't ask any questions relative to his employment.

COURT:

Counsel has a right to cross-examine this witness.

DEFENDANT:

Yes, but only as to matters material to the charges before the court, and I fail to see how

his occupation has any relevancy whatsoever to the charges against me of reviling the police and refusing to move on.

COURT:

Overruled, and I will allow the witness to answer the question.

DEFENDANT:

To which ruling of the Court I reserved formal bill of exception on the grounds that the testimony sought to be elicited by the question objected to is irrelevant and immaterial to any matter before this Court and goes beyond any matter brought out by the defense in this case.

COURT:

The Court will reverse its ruling and sustain your objection.

ATTY. KIEFER:

Q. Have you ever engaged Mr. Spencer to be your attorney in the past, prior to these incidents?

A. No.

Q. This was the first time you had ever engaged Mr. Spencer as your attorney?

A. Yes.

Q. Were you present in the District Station when Mr. Spencer was there?

DEFENDANT:

Objection. It is irrelevant and immaterial, and goes beyond any matters brought out by the defense in this case. This is not proper rebuttal. He is not rebutting anything brought out in the defendant's case.

ATTY. KIEFER:

It is certainly material to the case. He has put this man on the stand. I wanted to find out if he knows anything else.

COURT:

Objection sustained.

ATTY. KIEFER:

Q. Have you ever had any other charges against you?

DEFENDANT:

Objection.

COURT:

Sustained.

ATTY. KIEFER:

I have no other questions of this witness.

DEFENDANT:

We rest our case.

ATTY. KIEFER:

That is the City's case.

ARGUMENT

ATTY. KIEFER:

I am sure you are well aware that this is a case which deals with the integrity of an attorney as well as the integrity of the enforcement agency of the City; however, two charges have been placed against the Defendant, reviling the police and refusing to move on. You have heard the testimony of the two officers, a Patrolman and a Lieutenant. There were numerous subpoenas issued for the purpose of attempting to impeach or distort the credibility of these witnesses. However, none of these subpoenas was executed and there has been nothing whatsoever in this record to in any way, shape, manner or form blemish the words which they spoke here before you. Insofar as the charge of refusing to move on, they had no reason whatsoever from their testimony to realize or to even believe or to even speculate that the defendant had any reason or lawful busi-

his occupation has any relevancy whatsoever to the charges against me of reviling the police and refusing to move on.

COURT:

Overruled, and I will allow the witness to answer the question.

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It is certainly material to the case. He has put this man on the stand. I wanted to find out if he knows anything else.

COURT:

Objection sustained.

ATTY. KIEFER:

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DEFENDANT:

Objection.

COURT:

Sustained.

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ness in the First District Police Station. At no time did he represent himself to the officers as an attorney. He was not familiar to them as an attorney. They did not know him to be an attorney, and certainly by the nature of the charges his conduct was not at that particular time that of an attorney. When asked to move on he did not move on. When asked again to move on he refused to move on. When requested by another officer, in order to even avoid this charge, to "just leave", he still did not move on, and at that time he was booked for refusal to move on. As to the next charge of reviling the police, there can be no doubt whatsoever but that the Lieutenant and the Patrolman were both insulted, reacted in that manner and felt a serious offense at the manner in which they were addressed, and the words which were spoken to them, including the demonstration of pointing a finger at a Lieutenant and saying, "Look, buddy". This is certainly not a proper way to address an officer of that rank, much less any other member of the Police Department, especially when he knew he was an attorney and they did not know he was an attorney. The words which he used such as "that smart Lieutenant", or "Those smart cops", are approbrious words, insulting words, and they took issue with it and booked him accordingly with the charge of reviling the police. The City has carried the burden all the way. It has not been attacked. It has not in any way been minimized. I think that there is pure, convincing, overwhelming proof to substantiate the two charges made herein, that of reviling the police and refusing to move on.

DEFENDANT:

I would like to start by reading the Ordinance Section 49-7, entitled "Cursing, Etc., Police Prohibited", which states, "It shall be unlaw-

ful and a breach of the peace for any person wantonly to curse or revile or to use obscene of opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty". I wish to point out some of the elements of this offense, one, that the cursing or reviling must be done wantonly. Wantonly is defined as unchaste or lewd or lascivious. I have not heard any testimony to indicate the defendant committed or said anything in a wanton manner. There is no testimony as to the remarks attributed to the defendant having been made in an arrogant recklessness with complete disregard of justice. This is another definition of the term "wanton". There was no testimony as to whether the police officer was actually engaged in the performance of his duty at the time in question. One of the elements of the offense is that the officer must be engaged in performing his duty at the time the words were spoken. None of the words which the witnesses for the City have testified that the Defendant spoke can be categorized as cursing or reviling or obscene or opprobrious under any definition of any dictionary that I have been able to find. For instance, opprobrious means expressive of opprobrium, attaching disgrace, reproachful, scurrilous, infamous. These are only a few of the terms. If this ordinance relative to reviling the police as it is termed in the affidavit does not prevent something less than obscene language or lascivious language, I must contend that the ordinance is unconstitutional, is violating the freedom of speech guaranteed by the Fourteenth Amendment.

ATTY. KIEFER:

There has been absolutely no attack leveled against the ordinance under which he was charged relative to the constitutionality or unconstitutionality thereof, and therefore it is

not a proper subject to argue. You should argue facts and not law. It is up to your Honor to decide, and if he takes issue with the law it was by preliminary motion that he should have put you aware of his intent.

DEFENDANT:

The fact that the constitutionality has not been put at issue does not mean that I cannot do so now. I have a number of propositions of law which I will submit to the Court at the conclusion of my argument for the Court to rule on if the Court feels it is necessary.

As to the constitutionality of the application of this ordinance is that criticism which is made in language which is something less than obscene or lascivious would be a violation of the freedom of speech guaranteed by the Fourteenth Amendment to the United States Constitution, as this freedom was expressed in the State of Louisiana versus Garrison, cited by the United States Supreme Court. I am contending that it would be unconstitutional to interpret this ordinance as prohibiting any criticism of a police officer which is not obscene. There is no cursing involved, and I do cite the recent case of the United States Supreme Court.

COURT:

I don't understand what you are saying. This ordinance of which you speak, as you read it said "wantonly to curse and/or revile or to use obscene or opprobrious language towards or with reference to. Which one are you telling me is a violation of freedom of speech? The cursing, reviling, obscene language, or all?

DEFENDANT:

I think all of them could be interpreted in such a manner that they are unconstitutional. If you interpret the term opprobrious language

towards a policeman as including a statement by me that the police officers in this city behave like police officers in a Fascist police state, this is opprobrious and tends to bring disgrace upon the Police Department, but my freedom to do that is protected by the Constitution, and this ordinance cannot constitutionally be applied to prevent that type of language. These officers suggested on the stand that I criticized the manner in which they went about arresting people. They suggested that I accused them of arresting people without reasonable grounds. I did do that. Let's assume the truth of that. My statement to that effect, that they did do this without reasonable grounds, that they made it a practice to do so is constitutionally protected under the terms of the decision in the case of Garrison versus Louisiana. I have a freedom to criticize any public official. I can even say untrue things about him as long as I do not know they are untrue at the time. I can even do it maliciously as long as my statement is not a reckless falsehood. The ordinance cannot be interpreted in such a manner as to prohibit that kind of language when directed towards a police officer, and at the same time I contend that even the broadest interpretation of this ordinance would not include any of the things that I am accused of having said. The other offense is Section 42-90, entitled "Same—Idle Persons; Loiterers, Prostitutes, etc." I can only find one section in this that might apply to this case, and that is Section 6, which states that "Person who shall, without legitimate business thereat, remain, loiter or idle his time on the sidewalks or public streets or places within the limits of the city after having been notified to move therefrom by any officer or member of the police force". It has been established that the defendant in this case is an attorney

at law and was present in the police station on that night attempting to see his client, and to obtain his release from jail. I think that fully establishes a legitimate purpose in having been there. The fact that the officer did not know that he was an attorney has absolutely nothing to do with this, and is immaterial to this case, and this is why I directed my objection to that point in the trial. I have prepared several Propositions of Law. I would like to submit these propositions to the Court and close my arguments.

COURT:

This is a document in writing by way of support to your argument?

DEFENDANT:

No. This is identical to what we call Instructions to Jurors in a case that requires a jury. When you don't have a jury the revised statutes provide that propositions regarding a case may be put to the Judge, and he is to rule on these just as he would on instructions which would be put to a jury if this were a jury trial.

COURT:

You are now instructing me as to what the law is?

DEFENDANT:

I am arguing that is what the law is.

COURT:

You are proposing, or instructing?

DEFENDANT:

I am suggesting to the Court that that is the law, and I am asking the Court to rule on these matters.

COURT:

Would you give me the State Statute by which this is authorized?

DEFENDANT:

Yes.

ATTY. KIEFER:

If it is your pleasure to have a written answer in the record, then I will prepare a written answer to these propositions. I have not checked this procedurally, but whenever you do prepare instructions to juries, and counsel has stated that this is tantamount to an instruction to the jury, you do prepare them in advance and get rulings on them in advance and not at the last minute after the closing argument put them to the Judge, because by that time it is time for the jury to go out and make a decision. As I said, I can't pinpoint the manner in which this should have been filed procedurally or the manner in which I should have been apprised of it being filed. To that procedure I object.

COURT:

The Court will allow the propositions to be filed, but you have a right to oppose them.

ATTY. KIEFER:

In order to protect the interests of the City I have no other alternative but to answer these in a formal written manner, only in view of your ruling to my objection of them being presented to you. My objection is to the submission of this to you at this particular time, never having received a copy of this in advance of the trial and at the conclusion of counsel's closing argument, and which objection is simply leveled at the question as to whether or not you will use these propositions in order to reach your decision in this matter on either of these two charges, and in the event that you overrule the objection then I would like time to answer this in writing.

COURT:

Normally, the time to file these things is before

argument; however, the Court desires to give the defendant all latitude possible and will allow them to be filed.

ATTY. KIEFER:

To which propositions I now request that you will grant me a reasonable period of time in which to formally answer.

COURT:

How much time would you want?

ATTY. KIEFER:

One week.

DEFENDANT:

I object to his motion for additional time. The proper time is certainly before the case is submitted to the Court, and I think a week's delay or any delay is uncalled for in a case of this sort. If this were a jury trial the prosecution and the defense certainly have to submit their propositions of law at the conclusion of their argument at the very latest.

COURT:

The Court denies the request.

ATTY. KIEFER:

I would like to make some concluding remarks. In response to the argument of the Defendant, I submit to you that the term "wanton" should be taken in its complete sense, and that is the intent with which it was drafted into the ordinance. That was the intent with which it was enacted, and for this reason we take it in its common and acceptable sense, and in its common and acceptable sense it is associated with disregard and disrespect. Counsel questioned whether or not these officers were serving in a legal capacity. The third question asked each and every officer was, "In what capacity were you serving the New Orleans Police De-

partment on this particular day and at this particular hour", and each in turn responded with particularity telling you not only that he was serving as an officer of the law but where he was and what he was doing, so that has been clearly established. Insofar as the questions aimed at the opprobrious words as to whether they were or not, naturally this is the essence of why we are before you. The essence of the argument is simply that each and every event must come before a Judge to determine in an objective analysis of the testimony adduced at the trial as to whether the words used were insulting. Each and every incident constituted an insult to the integrity of the entire Police Department of the City of New Orleans. This is an attack leveled at their integrity, and that is the manner in which they reacted and expressed this reaction to you. Certainly it has to be beyond the use of so called four letter words of cursing. It has got to be beyond that, and these words were insulting to them and they expressed that to you, and, finally, as far as whether or not counsel had to identify himself or tell these officers that he was an attorney, this is very, very elementary to the charge as to whether or not he had any legitimate business there, or whether they had reason to believe that he had any legitimate business there. Just as an officer in plain clothes must identify himself before he proceeds, the attorney certainly must identify himself to law enforcement officers before he tries to take control of the entire First District Police Station. The facts are overwhelming. You have heard them. They have not been attacked. There has been no attack on the testimony presented by the City.

COURT:

The Court has carefully considered this matter and all exigencies thereunto connected and all

else, and renders the following verdict: The Court finds you guilty as charged on both charges. Are you ready for sentencing?

DEFENDANT:

I would like to enter an objection to the Court rendering a verdict before ruling on the Propositions of Law.

COURT:

I have taken all of that into consideration.

DEFENDANT:

I should like to have the clerk note my reservation of a formal bill of exceptions to the rendering of a verdict in this case before ruling on the Propositions of Law which I have propounded to the Court, on the grounds that this is a violation of the Louisiana Revised Statutes, Title 15, Section 339, and to the applicable statutes.

COURT:

I have ruled on them. I said I have taken that into consideration. The Court has carefully considered this matter and all exigencies connected and all else, and renders the following verdict. Are you ready for sentence?

DEFENDANT:

I am.

COURT:

The Court hereby sentences you to pay a fine of fifteen dollars ($15.00) or serve five days in jail on each charge. The Court feels that there should be a suspension of the execution of the sentence, and the Court hereby suspends the execution of the sentence.

DEFENDANT:

I should like to make a motion for an appeal.

COURT:

Motion for appeal is granted.

CERTIFICATION BY THE COURT:

I hereby certify the foregoing to be a true and correct copy of the notes of evidence in the above cause.

JOSEPH R. BOSSETTA
JUDGE

Stenographer

APPENDIX E

12-4-64

ATTY KIEFFER:

I am here to answer writ for subpoena duces tecum.

COURT:

I deny that. You don't have to answer it.

ATTY SPENCER:

I renew my motion and wish to reserve a formal bill of exception to the denial of Court for motion on attachment of a witness subpoenaed for whom I have requested the Clerk of this Court on the grounds this is denial of defendant's right.

COURT:

I have examined the return on the subpoena. Return on service 12-3-64 serve one Joseph Giarrusso by D. A. Spencer, name of attorney, making the service, this is the attorney before the bar today. I don't believe under the provisions of any City Ordinance he is permitted or granted authority to make service on any one.

ATTY KIEFFER:

Let the record reflect Supt. Giarrusso is in Court.

ATTY SPENCER:

Testimony of Dean Cecil Morgan who knows defendant, Stephen Wainwright, that defendant is a student at Tulane University and was at the time of the alleged offense, that he knows defendant's reputation for truth and his general character in that they are good, and he is considered to be a truthful person by those who know him.

COURT:

Let's take character witnesses.

ATTY KIEFFER:

No objection to that but to statement of Dean Morgan I reserve all rights on cross-examination.

PROFESSOR LOWELL TURRENTINE, DULY SWORN, TESTIFIED:

ATTY SPENCER TO PROFESSOR LOWELL TURRENTINE:

Q. State your name?

A. Lowell Turrentine.

Q. What is your occupation?

A. Visiting professor of law Tulane University.

Q. Mr. Turrentine are you an attorney?

A. A member of the bars of the State of New York, Ohio, State of California and U. S. Supreme Court.

Q. You stated you are a visiting professor at Tulane?

A. Yes.

Q. Do you know Stephen R. Wainwright?

A. Yes.

Q. How long have you known him?

A. Approximately 2 years and 3 months.

Q. What has been your relationship with Mr. Wainwright?

A. He has been an attentive and industrious student in my class, I have come to know him personally and socially, and he has been a welcome guest in my home.

Q. Do you know what defendant's reputation for truth and veracity is?

A. I believe I do.

ATTY KIEFFER:

I object. I am not satisfied he is qualified to know the reputation.

COURT:

Overruled. Proceed Mr. Spencer.

PROFESSOR TURRENTINE:

Excellent.

ATTY SPENCER TO PROFESSOR L. TURRENTINE:

Q. He has a very fine reputation among law students and members of the staff?

A. Yes, to my knowledge.

ATTY. KIEFFER TO PROFESSOR LOWELL TURRENTINE:

Q: Did you frequently go out with him at night, Professor?

A. I have never been out with him at night.

Q. Have you ever visited with him at his home?

A. I have not.

Q. Are you married?

A. Yes I am.

Q. Outside of class room and your knowledge of him as a student these are the only personal knowledge of what he does, or when he comes to visit at your house by your invitation?

A. Not entirely. I have had contact with others who know him, including his room-mates. Chiefly however through personal contact with him.

Q. After all this arose?

A. Not quite. Prior to this Mr. Wainwright applied for admission to Stanford University Summer School. In that connection I had considerable contact with him. I was at Stanford that summer and talked with the Associate

Dean who handles those matters and was familiar with Mr. Wainwright's record and discussed it with the people there.

Q. It is possible he could be belligerent at times isn't it?

ATTY SPENCER:

I object.

COURT:

Sustained. Next question.

ATTY KIEFFER TO PROFESSOR LOWELL TURRENTINE:

Q. Have you ever been out with the man when he has been drinking?

A. I have not.

Q. No other questions.

ATTY SPENCER TO PROFESSOR LOWELL TURRENTINE:

Q. Have you ever attended social functions sponsored either by the Tulane University School of Law or Law Students at the School, their annual dances or meetings?

A. I have attended student functions but not annual dances.

Q. At any of these functions you attended did the students consume liquor — they were social functions?

A. Yes.

Q. At any of these functions have you ever seen Mr. Wainwright conduct himself in a belligerent manner?

ATTY KIEFFER:

I object.

COURT:

Sustained.

MR. CUTHBERT S. BALDWIN, DULY SWORN, TESTIFIED:

ATTY SPENCER TO MR. CUTHBERT S. BALDWIN:

Q. State your name.

A. Cuthbert S. Baldwin.

Q. What is your occupation.

A. Attorney.

Q. Are you a member of a local law firm?

A. Baldwin, Haspel, Maloney, Rainold & Meyer.

ATTY KIEFFER:

I will stipulate to all qualifications of Mr. Baldwin and submit he is quite a reputable attorney in the City of New Orleans.

ATTY SPENCER TO MR. CUTHBERT S. BALDWIN:

Q. Have you ever been a delegate to the American Bar Association?

A. A member of the House of Delegates of the American Bar Association for roughly 10 years.

Q. Have you ever had occasion to meet the father of defendant, Stephen Wainwright?

A. Yes.

Q. What is your knowledge of the senior Mr. Wainwright?

A. Mr. Wainwright, Sr.?

ATTY KIEFFER:

It is again irrelevant and immaterial to the charges in this case.

COURT:

Overruled.

MR. CUTHBERT S. BALDWIN:

Mr. Wainwright, Sr. was in the House of Dele-

gates of the American Bar Association approximately 3 years when I was in and that is where I met him. I have brought here his biographical history, which is out of Martindale's Legal Directory.

ATTY SPENCER:

I ask for the Supt. of Police and also the PBI gentleman for whatever time you are setting the case for.

COURT:

We will return at 8:00 o'clock tonight to hear the rest of this case.

5-7-65

ATTY SPENCER:

I would like attachments issued to all people who we subpoenaed and who are not present in Court:

COURT:

Dr. Levy has been excused by Judge Lancaster. Dr. W. Kohlman Reed's service * * *.

ATTY SPENCER:

I wish to file a motion * * * the failure of this State to prosecute the matter * * * to continue this case would be putting defendant twice in jeopardy.

COURT:

Motion is denied. I am ready but * * *.

ATTY KIEFFER:

I would like to have proper motions.

ATTY SPENCER:

I have proper motions prepared. I am unable to furnish a brief.

COURT:

I will deny it without the brief.

ATTY J. B. KIEFFER:

I would like to have all witnesses present sequestered in so far as City witnesses * * * officer Boepple, Officer Otteson and Lt. Martello.

ATTY SPENCER:

We would like to have the witnesses instructed they are not to discuss this case amongst themselves.

COURT:

You are not to discuss this matter amongst yourselves.

COURT:

There was a note left with some individual I don't know whom, to the effect Dan Haggerty was to be served — something about a subpoena duces tecum Criminal District Court Case #188-368 — Section "E." The Court takes the position this isn't proper way to obtain same and this has been denied and Mr. Haggerty has been excused.

COURT:

Insofar as Dr. W. Kohlman Reed — denied because his Secretary signed for his service. Dr. Levy was excused by Judge Lancaster and we will permit defense to bring him in at a later date. We will stipulate he will testify to certain things.

ATTY KIEFFER:

I have no objection. The City is willing to stipulate, but find it would be objectionable because it is immaterial and irrelevant.

OFFICER BOEPPLE, DULY SWORN, TESTIFIED:

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. State your name officer.

A. Elmo H. Boepple.

Q. You are a member of the N. O. Police Dept. so employed 10-13-64 at approximately 12:45 A. M.?

A. I am, and I was employed at that time.

Q. Are you familiar with an incident which occurred on Toulouse and Bourbon, which is in the City of New Orleans?

A. I am familiar with the case.

Q. Do you recognize defendant standing before the Court?

A. I do. The gentleman to my left.

Q. Please tell the Court under what circumstances you first discovered Stephen R. Wainwright, on the date, time and place heretofore stated?

A. On the 12th of October about 11:00 o'clock I was assigned to Car #12 — regular patrol duty. It is a blue and white marked vehicle of the N. O. Police Dept. I was attired in regular police uniform of the day. Car #12 cruises in the French Quarter. On or about the 10th of October Car #12, the officers working in that car were given specific instructions by our Platoon Commander and along with the instructions they were given a composite picture and also a photograph of a wanted subject who allegedly had committed a murder. At about 12:30 on the morning of the 13th of October me and my partner, John Otteson, were cruising on Bourbon St. We were going slow. Traffic was very light. When we passed the intersection of Toulouse and Bourbon at about 100 or 125 feet beyond the intersection of Toulouse St., I observed subject standing facing toward Canal Street. This person standing there resembled the person, or the composite.

ATTY SPENCER:

I object.

COURT:

Sustained.

ATTY KIEFFER:

For classification of the Court I would like to add to my original question, "and on what conditions did you recognize the defendant, who is present before this Court?"

COURT TO OFFICER BOEPPLE:

Answer the question.

OFFICER BOEPPLE:

The subject I observed standing in the 600 block of Bourbon St. fitted the description.

ATTY SPENCER:

I object. There is no charge here of his being a wanted criminal.

COURT:

What is the purpose of your question, Mr. Kieffer?

ATTY KIEFFER:

To lay the ground work for the reasons why the officer stopped to interrogate this defendant.

COURT TO ATTY SPENCER:

What is your objection?

ATTY SPENCER:

It is irrelevant and immaterial.

COURT:

The answer is irrelevant but the question is relevant. Overruled.

COURT TO OFFICER BOEPPLE:

Answer the question.

OFFICER BOEPPLE:

This subject whom I observed standing in the 600 block of Toulouse fit the general descrip-

tion of a person drawn on the composite and also on the photograph, which was given to myself and Officer Otteson on or about Oct. 10th. This subject had committed a felony.

ATTY SPENCER:

I object. Defendant isn't charged with a felony and I move that the testimony be stricken from the record.

COURT:

Sustained.

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. The suspect, which you are referring to that was wanted for the felony is one that you had prior reference to as being the one that was given to you in your patrol car by order of the Lieutenant, is that correct?

A. Correct.

ATTY SPENCER:

I object on the grounds the evidence as to whether or not he resembled the person, is completely irrelevant and immaterial.

COURT:

Overruled. We all know in an arrest of an individual the Criminal Code of Procedure Article 60 must be complied with.

ATTY SPENCER:

I object to any testimony of the witness with regard to resemblance of this individual, because it is irrelevant.

COURT:

I feel it is relevant and material because of Article 60 of the Code of Criminal Procedure. Answer the question.

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. Proceed.

A. Yes it was.

Q. Please elaborate on that particular point it is relevant to Tuesday, Oct. 13, 1964?

A. On seeing this subject in the 600 block of Toulouse I stopped the vehicle. I backed up about 30 feet, stopped it, and I noticed subject at that time beginning to walk toward Canal Street. My partner got out of the vehicle. I approached subject and began questioning him. I asked the subject what was his name?

ATTY SPENCER:

That is hearsay. I object.

COURT:

Overruled. Proceed.

OFFICER BOEPPLE:

I asked subject his name.

ATTY SPENCER:

Objection. It is hearsay.

COURT:

Overruled. Proceed.

OFFICER BOEPPLE:

Subject stated his name was Stephen Wainwright. I asked the subject where he resided. He gave me an answer of here in the French Quarter. I asked him where at in the French Quarter.

ATTY SPENCER:

I object on the grounds it is hearsay evidence.

COURT:

Overruled. Proceed.

OFFICER BOEPPLE:

I then asked the subject * * *.

ATTY SPENCER:

I object.

COURT:

Overruled. Proceed.

OFFICER BOEPPLE:

Where at in the French Quarter. He gave me a specific address on Ursuline St. I then asked the defendant if he had any documents on his person for verification that he was Stephen R. Wainwright. Subject at this time became belligerent; he attempted to walk away from us and we detained him. About using any physical force by stepping in front of him, we advised him we were not completed with our questioning. Defendant stated, "Look I know the law." "I am a law student; the law says I must only give you my name and my address; that is all I am required to give you."

He again tried to walk off. We detained him without any physical force. I then changed my kind of questioning to ascertain as to what he was doing in this particular section of the City at this particular hour of the night. He said, "I don't have to tell you, but if you need to know, I was going to a restaurant to get something to eat." At the time I first observed him he was standing still. He was quite nervous, which led me to believe that defendant before the bar and the subject on the composite was one and two of the same person. I at this time went back to the police car, while my partner remained on the sidewalk with defendant. I obtained a photograph and composite drawing which homicide division had made previously and I compared the likeness of defendant and subject on the photograph and composite and the likeness was there, so I decided to continue my questioning of subject and I tried to reason every way possible with this defendant. I informed him, "The reason we question you is because you fit the description of an individual who committed a murder a week or so

previous." I spoke to him. I asked him to co-operate with the police, if he could verify he wasn't the subject we were looking for he could proceed.

I also asked this subject for his draft card, knowing he is well within range, he was to carry the card with him at all times. He said he didn't have it, it was at home.

He mentioned that he was a Tulane Law Student. I didn't ask him that.

I explained to him the subject we were looking for, for whom I had the composite in my hands, had a tattoo on his left forearm. It was a tattoo "Born to raise hell."

Defendant was wearing a white denim type jacket with light cuffs. You could notice underneath he had a T-shirt, and he had a pair of dress slacks.

[redacted] subject's attitude led me to believe he was not a law student. His actions certainly reflect he wasn't a law student. He was not dressed as a law student.

I asked him to remove his jacket so I could examine his left arm, to see if he did or did not have this tattoo.

Defendant became very belligerent, threw up his arms saying, "I refuse to allow myself to be molested by a bunch of cops here on the street."

I told him, "you leave me no alternative, but to place you under arrest and convey you to the district station." He attempted to walk off. We stepped in front of him. No physical force was used to detain him.

We walked him to the car. He sat on the front seat. I explained to him he must be seated in the back seat, and he got in the rear

seat and my partner got in the back seat with him.

I started the vehicle and we proceeded to the station. At this time I got on the radio contacted Platoon Commander in Car #10 and advised him of the arrest, which we had made, and asked that he be present in the station, as we had subject who we thought might be connected with this murder.

We also got in touch with the homicide division team in Car #317 and requested that they meet us at the First District Station. They acknowledged they would do so. As we got to the location of St. Peter and N. Rampart defendant said, "you are actually taking me to jail?"

I said, "That is right, you are under arrest."

He said, "All right, you stupid cops."

I advised him that he would also be charged with reviling the police. I advised him for his own sake he should remain quiet for the rest of the journey to the station.

Nothing further was said until we go to the station. We took the defendant into the interrogation room. He insisted on using the 'phone immediately. We informed him of the procedure, that as soon as he was booked, he would then be allowed to use the telephone. We were awaiting the arrival of Lt. Martello and two homicide officers.

During this wait — it was no longer than 5 or 10 minutes — defendant paced nervously back and forth in the interrogation room. There were chairs available; he could have had a seat, but he kept pacing.

Lt. Martello and the officers in Car #317 arrived at the station.

My partner remained in the interrogation room, and I went out and advised Lt. Martello and the other officers why I arrested subject.

Lt. Martello informed me, he said, "All right Officer Boepple I will handled the investigation from here on out."

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. Do you have a copy of the composite to which you refer to in your testimony?

A. I do.

Q. Could you let us see it please?

(Officer Boepple produces composite and hands same to Atty Kieffer.)

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. I show you what we will mark "City Exhibit A" for identification purposes and I ask you if you recognize this?

ATTY SPENCER:

I object, because this is irrelevant and immaterial.

COURT:

Overruled. Proceed, Officer Boepple.

OFFICER BOEPPLE:

Yes, This is a composite, which our Platoon Commander gave the officer in Car #12 on or about October 10th.

ATTY KIEFFER TO OFFICER BOEPPLE:

Q. Would you read what this composite that has been marked "City Exhibit-A" reflects the man was wanted for?

A. All right. Under Item J-3546-64 wanted for murder. Under this item number is October, 1754 St. Charles Avenue, October 6, 1964, wanted subject. Unknown white male, approximately 23 years of age, 5'8" tall, 175 pounds, medium build, short brown hair. It says fur-

ther case of Capt. E. Stephens, Lt. J. Kruby, Detective Orin Mills, Jr., Homicide Division.

Q. Did you specifically ask Mr. Wainwright to take his jacket off?

A. I did.

Q. What was his statement to you?

A. He said, "I refuse to allow myself to be molested by a bunch of cops in the middle of the street."

Q. Did he respond in any other way to refuse to take his jacket off?

A. He attempted to walk off.

Q. Was his jacket ever removed on the street?

A. No, sir.

Q. What was your testimony regarding who was with you in the car?

A. Officer John Otteson.

Q. I have no other questions of this witness as this time.

ATTY SPENCER TO OFFICER BOEPPLE:

Q. Officer Boepple, have you discussed your testimony in this case with any one in preparation to coming here to testify today?

ATTY KIEFFER:

I object.

COURT:

Overruled. Answer the question.

OFFICER BOEPPLE:

Yes.

ATTY SPENCER TO OFFICER BOEPPLE:

Q. With whom?

A. With the parties involved and the attorney.

Q. Specifically what parties involved, what police officers, what attorneys did you discuss it with?

A. Lt. Martello, John Otteson and Mr. Kieffer.

Q. Did you discuss in detail everything you would testify to today?

A. No, just the main points of the case.

Q. You stated that the defendant Stephen R. Wainwright, was standing 125 feet from the corner of Toulouse and Bourbon. That is very specific how can you remember it?

A. It was approximately 125 feet, Mr. Spencer.

Q. How is it that you have such a very good memory of that, did you write down everything that happened that night?

A. Of this case in particular, I remember everything quite well.

Q. Did you discuss that aspect of the case with the other officers?

A. No.

Q. You testified also that you backed up 30 feet after you passed defendant?

A. That is right.

Q. Did you discuss that with the other officers?

A. No, sir.

Q. You stated he was standing still?

A. When I first saw him, yes.

Q. Was he looking at someone?

A. He was facing toward Canal Street. He might have been looking at something, I don't know.

Q. How long would you say he stood there without moving?

A. I can't say, because I saw him a matter of three, four or five seconds.

Q. You don't know whether he stopped to light a cigarette?

A. I drove by there once prior to that, and he wasn't there then.

Q. How long did you watch him?
A. Not very long — five seconds.

Q. When you first saw him did it immediately occur to you that he resembled the suspect that was wanted for murder?
A. Yes, just about the time it took me to drive 25 or 30 feet. This man looked familiar to me. I put two and two together.

Q. How many days before this incident was this composite drawing brought to your attention?
A. I think 3 days.

Q. How many other wanted persons were brought to your attention in those 3 days?
A. None where photographs or composites were given.

Q. This was the only photograph and composite?
A. Yes, in the past 3 or 4 days.

Q. When you first walked up to the defendant, I believe you testified, you asked him who he was?
A. Yes, I did do all questioning in the street.

Q. He told you his name was Stephen Wainwright?
A. He did.

Q. He told you that he lived on Ursuline Street?
A. He said here in the French Quarter — something evasive.

Q. What is evasive about that?
A. People say around the corner on a certain street. I wanted a specific answer. I questioned him.

Q. How many questions did you have to ask him?
A. Three times, First time in the French Quarter. Second, Ursuline, then he gave me a specific address.

Q. How far is Ursuline Street from the point where you stopped the defendant?

A. Not very far — a matter of, I would say, 4 blocks at the very most. About 4½ blocks.

Q. Did you believe defendant when he told you he lived on Ursuline St.?

A. Yes.

Q. Did you believe him when he told you he was Stephen Wainwright?

A. No. He refused to show identification.

Q. Why would he say he wouldn't give you any identification, did he give you a reason?

A. Yes. He said he didn't have any. He had left it at home.

Q. How could he cooperate more fully with you, if he didn't have any identification on him?

A. Merely by removing his jacket and letting me see his left forearm. If he would have done that he wouldn't be in Court today.

Q. Asking him to disrobe in the middle of the street?

A. I don't think it is asking him to disrobe.

Q. You don't think it is unreasonable to ask a man to remove his coat on Bourbon St.?

A. No, sir.

Q. This led you to suspect him?

A. This added to my suspicions.

Q. Did defendant at any time offer to get you his identification?

A. As we were getting out of the car at the First District Station.

Q. Did you know before that?

A. No.

Q. You didn't go to see if he did have identification?

A. No.

Q. Why not?

A. The man was already under arrest at that time.

Q. What did you arrest him for at first?

A. Vagrancy by loitering, reviling the police, resisting an officer.

Q. The first charge against him was what?

A. All three were put on at the same time.

Q. What did you arrest him for first?

A. Vagrancy by loitering — resisting an officer.

Q. At what point did you charge him with resisting an officer?

A. The charges were all brought at the station.

Q. You arrested him on Bourbon Street. What did you arrest him for there?

A. Resisting an officer and vagrancy by loitering.

Q. How did he resist you on Bourbon Street?

A. By attempting to walk off.

Q. Did you stop him?

A. We informed him he was under arrest. He attempted to walk away.

Q. What did you do then?

A. We stepped in front of him. We told him he would have to go with us.

Q. Did he resist then?

A. No.

Q. What did his resistance consist of — just turning and walking away?

A. Yes.

Q. Which way did he walk?

A. Toward Canal.

Q. Which way was your car parked?

A. Toward Esplanade.

Q. In which direction were you standing?

A. Facing the man. My partner was to my left, and he just turned around and started to walk off. My partner got in front of him and detained him.

Q. He did not at any time offer any forcible resistance?

A. That is correct, but he also did attempt to walk off after he was told he would have to go to the station with us.

Q. You also have him charged with vagrancy — Section 42-85 Paragraph 3. This says all persons wandering abroad, etc. What made you suspect he was doing any of these things?

ATTY KIEFFER:

I object. The man was booked in a different manner by a different person. The man is charged with vagrancy by loitering.

OFFICER BOEPPLE:

When I first observed him he was standing still for 5 seconds.

ATTY SPENCER TO OFFICER BOEPPLE:

Q. At the most?

A. Yes.

Q. Is this what his loitering consisted of?

A. That and the fact he couldn't show me any identification to verify whom he was.

COURT:

Case continued.

ATTY SPENCER:

I would like to find out what conduct is irritating. I flew down from Shreveport to try this matter. Defendant is engaged in exams at Tulane. I make a formal objection to the continuance of this case.

COURT:

You may do. Miss Heaton make a note defendant continued to shake his head. He turned his back to the Court. He walked about with his back to the Court on at least 3 different occasions.

5-11-65

Stenographer instructed to make following note in records of the Court.

"The Court on one previous occasion admonished the defendant because of his physical actions in Court of shaking his head in agreement or disagreement to statements of witnesses. The fact that he didn't stand before the bench and that he was walking about and turning his back to the Court would display arrogance and contempt. This happened on another occasion prior to continuance of the case.

The case was continued because of the fact that the Court was of the opinion, based upon the actions of defendant that he was acting in an arrogant and contemptuous manner. Continuance was based upon the fact that the Court didn't wish to sentence defendant for contempt, and the Court so stated to the defendant.

The Court discovered from Officer Heath on one occasion defendant said, "you lying son of a * * * *." To whom he was referring he can't say. Defendant appeared before the bench and asked to address the Court, and the Court permitted him to do so, at which time the defendant stated that none of his actions were meant as a disrespectful act to the Court. Defendant did state he was sorry. Defendant stated that the officer's lying is what caused him to be so upset.

Court // I received this in the mail. Mr. Spencer and I feel as though we should read it. Petition of Stephen R. Wainwright, defendant in case entitled City of New Orleans v. Stephen R. Wainwright, #B-80503 on the docket of Second Municipal Court of the City of New Orleans respectfully shows that defendant is charged in three affidavits with violating Ordinances relative to resisting arrest, #42-85 (3) relative to loitering and #49-7 relative to reviling the police. It is alleged in that affidavit that defendant violated said Ordinances on Tuesday, October 13, 1964. On December 4, 1964 trial of this case was begun and two witnesses heard. They testified as to the character of the defendant and to the fact he was and had been a student in the School of Law at Tulane University. Following the testimony of the two character witnesses the Court ordered trial of this matter continued indefinitely. That isn't true. This statement is false.

Over strenuous objection of Counsel for defendant sometime in April of 1965, subpoenas were issued to defendant and his attorney, Dan A. Spencer, at the time of continuance of trial.

Trial was set to resume May 7, 1965. At commencement of trial a number of witnesses for whom subpoenas had been requested were not present in open Court. That is true.

Court refused to issue attachments for these witnesses. He wanted me to attach Dr. Levy, who had been excused by Judge Lancaster, Dr. Reed and Supt. Joseph I. Giarrusso, who was available to the Court by telephone. Although he had seen fit to sequester the Dean at Tulane University of La. a prospective character witness for defendant — that isn't true. This is false. I offered the

Dean the use of my back office so he could have the use of my telephone and he need not sit in this Courtroom. I also feel that the Dean of a Law School is a man of quite a position and I wanted to offer him the best I had and I realize he is a very busy man.

The case was thereupon continued until May 14, 1965. Once more over strenuous objections of Counsel for defendant you said you had to fly in from Shreveport and your client had exams.

During the course of testimony the defendant was forced to stand at attention. He was standing as much at attention as you are now. This procedure has been used in Court for 15 years. I, myself, stood before this very same bar for eight years as a practicing attorney. Your Attorney, Mr. Spencer, was standing, and Mr. Kieffer was also standing. You are not standing at attention now, Mr. Wainwright. You will not turn your back to this Court and make remarks for others to hear, such as "you are a lying son of a" and stop there.

During the course of testimony defendant was forced to stand at attention before the dock — that means something like the Captain.

I didn't threaten you, Mr. Wainwright, but I will place you in jail, Mr. Wainwright, if I think your actions are contemptuous.

I reset this matter so I would not have to send you back to the House of Detention for a 24 hour period.

Judge said he was doing so in retaliation * * *. He further stated the fact that I didn't say this until the whole matter was finished. The reason I had reset this matter is the fact I didn't wish to send you to the House of Detention. This reason was in my mind and heart.

Counsel for defendant was from Shreveport. You said it would necessitate expenses for plane to come here, and you would be forced to * * *. It doesn't make any difference to me that you have to travel Mr. Spencer from Shreveport to here.

I would like to accommodate you, and I did attempt to. When you placed two witnesses on the stand — one who knew defendant's father — and the other one, I forgot his name — I did accommodate you at that time and when you called on the telephone requesting a different date other than the 13th you were accommodated.

Dr. Levy received his service so late that he couldn't get into Court.

As he, the Judge, understood that defendant's father "was a successful attorney and could afford counsel's fee."

(1) Due to the testimony of a character witness that knew his father but didn't know him, I deducted that this individual's father is a successful attorney. This isn't anything.

(2) And could afford your fee — I didn't use the word "fee" — could afford expenses from Shreveport here. Your fee I'm not interested in. I don't know whether you are going to be paid a dollar or a thousand dollars.

Further that defendant had exams didn't make any difference. It didn't make any difference.

When he turned his back to the Court I said, "Mr. Wainwright this is improper. The second time he nodded his head in approval and disapproval of what the officers were saying. I asked him to cease and desist, and he didn't do a thing. And when Officer Heath was in the Court that is when he made this remark, when he turned his back to the Court.

If these actions are not contemptuous, I am willing to be put in my place, as to what actions are contemptuous and what are not contemptuous.

It shows that he will suffer irrevocable injury as a result of these judgments and actions, etc. This case is prosecuted by the City of New Orleans for violation of Municipal Ordinances.

(1) That their continuance of this case from time to time over a period of five months constitutes a violation, etc. * * *. That is one sentence with quite a few statements. It was set to go to trial. This building consists of one courtroom for four Municipal Courts to use at set hours. My time had run way into Judge Bossetta's Court hours and I had to give up to Judge Bossetta. We reset your matter for 8:00 o'clock P. M. that same night. The matter would not have been completed until after midnight, as Judge Bossetta had a crowded docket, and 10:00 o'clock court had to use the Courtroom after Judge Bossetta's docket was completed, and the matter went down to be reset.

Going through my docket I discovered it and reset it. It was for the purpose of not sending Mr. Wainwright to jail.

That forcing of defendant to stand at attention * * * constitutes a violation, etc. * * *. I have already answered that.

Whether a trial judge may intimidate a defendant, etc. I have answered that. I am not threatening this gentleman by making a statement that I will place him in jail for contempt. If such is a threat, then it is a threat, and I will do it.

Whether defendant may be deprived of his right, etc.

I never said you cannot have a witness in this Court, which gets us back to Supt. Joseph Giarrusso. You walked into the office or chamber and asked if I would issue an attachment for a witness, who has been served and not present in Court and I said "Yes, Mr. Spencer" and you, Mr. Spencer said, "I want an attachment issued for one Joseph Giarrusso." I said if the Superintendent of Police had been properly served and wasn't here in Court, I will issue an attachment for his arrest. I asked my clerk to let me see the service. After checking I discovered all officers had been properly served with the exception of Spt. Giarrusso. Proper service had not been made.

Continuances. I would appreciate it if you would submit a brief on this particular point.

Imagination. It wasn't imagination. If the same thing occurs today, I will let you find out if it is contemptuous or not.

I have answered that.

The Court in failing to issue instanta subpoenas or attachments — I did state I would issue one until I looked at the service and there wasn't domiciliary or personal service.

Defendant doesn't have good health, etc. * * *. Please don't stand at attention.

This is a * * *. I consider myself a liberal man.

Jail defendant for contempt. I didn't threaten him.

This constitutes a shameless travesty, etc.

Beaten by the N. O. Police Dept.

When his attorney attempted to see him the attorney was ordered from the police station and arrested for re-

fusing to leave without seeing his client. I don't know this portion.

On the evening on which defendant was arraigned the attorney was informed by one Judge of Municipal Court. This I can't answer, for unless you wrote to me * * *. I will answer. Until you do so, I will let this portion alone.

That there would be a conviction whether defendant be an attorney, or priest or of impeccable character, etc. * * *. He said he and the other Judge * * * no one speaks for me. He and other Judges couldn't be re-elected without support of N. O. Police Dept. and must of necessity support the policeman. Ask the policemen how much support. I dismiss 75 or 80% of defendants who appear in my courtroom.

If you will recall, I told the Dean, as of now the facts surrounding this case would warrant a dismissal of defendant. I don't know the facts but as of now the facts I hear will not warrant a conviction of the defendant. I don't know where that leaves Office Boepple or Lt. Martello. You may file your Civil Action against them. That is your business.

I am here to do justice, such as is in my heart and mind, and I have done so for every day I have been sitting here.

I don't know whether Judge Bossetta is going to run for this job, etc. I don't know who said it to you.

Asked to * * * Chambers of presiding * * *. Unless he dropped the action he would be convicted. When he refused to drop the action against the policemen * * *. He was convicted on the record. Attempts were made on him not to take an appeal.

Prior to that, etc. #188-368.

These things I don't know. They aren't part of my business. Counsel has been informed by the City Atty's office * * * that doesn't bother me. It is not part of my business.

You are attempting to tie in what may have been said by others into what Judge Bossetta has been doing. I don't care what Mr. Kieffer does with his legal or personal life. I don't care what other judges do. I have stated this openly on the bench. No one on earth will speak or act for me.

(Copy) * * * at attempt to * * change probably will.

(Copy) Pleading guilty. That is a general statement. It covers this court. I will have to take these things one at a time.

A man may spend a million dollars to beat a case, that doesn't involve much. I know of one man who has spent that much defending himself. This is possible. It is in any court. You need not stand at attention before the dock of the Court. I wish I had looked this word "DOCK" up before I came to Court.

(Copy) * * * He will have to come again and again to Municipal Court. I don't know that. It is very possible he will.

(Copy) * * * not any slight movement. Mr. Wainwright don't you worry about that. In fact on occasions I have permitted old, decrepit ladies to sit down when the trial is going on. If your actions had been proper to start with, if you hadn't turned your back to this Court and doing things which I consider contemptuous I would have sent downstairs for a chair. You should have told me your duodenum was acting up.

(Copy) * * * to hear perhaps testimony of one witness. This does exist.

(Copy) I will issue any and all subpoenas you ask for promptly.

I will not grant that unless it is properly applied for.

If you want Mr. Dan Haggerty and you feel you are entitled to that, I may grant it to you.

(Copy) rights of court, mandamus, etc.

My mouth is dry again.

(Copy) Order.

I don't know that I can be ordered to do that * * * there are a number of reasons. I may want to continue it for Mr. Kieffer, for myself and for you.

It is possible a greasy egg has hit Judge Bossetta and the best thing for him to do is to continue the matter.

This is a discretionary matter. I am not saying you will complete the matter today.

* * * to cease and desist * * *. If you are suffering, I will send you a chair.

If you are sitting down I will expect you to act properly, which you weren't doing the other day, Mr. Wainwright. If you are feeling bad or weak I will send for a chair. That will be the reason and the only reason.

(Copy) I haven't threatened you Mr. Spencer but if your actions are improper I will tell you the same thing I told Mr. Wainwright. I haven't, as yet, said anything to you.

If telling you what I think is the power of this Court is threatening you, then call it that.

(Copy) to issue instanta subpoenas, etc. * * * This is your opposition which I would like to read, Mr. Kieffer.

COURT:

Miss Heaton make a note in the record that the attorney for the City and the attorney for defendant are in agreement that the doctors may be called at this time, so that their testimony may be taken so that they can return to their respective duties and work.

ATTY SPENCER:

Defendant does suffer from a weak back and stomach ulcers. Could we have a chair sent up for him?

COURT:

Yes. Get him a chair.
Note: (Defendant was given a chair in order that he could be seated in front of the bar for the entire trial.)

ATTY KIEFFER:

I would like defense counsel to waive any rights to an appeal at this time, because if he is dismissed only then will jurisdiction for this case be returned to you. He still has a right to a dismissal.

COURT:

I wouldn't worry about that. I don't want him to waive any right that he has for his client.

ATTY KIEFFER:

I am ready to proceed.

ATTY SPENCER:

I will stipulate that this Court has jurisdiction and is empowered to proceed at this time.

ATTY KIEFFER:

Not to waive defendant's rights.

COURT:

It is possible Mr. Kieffer what you may have left.

DR. WM. KOHLMAN REED, DULY SWORN, TESTIFIED:

ATTY KIEFFER:

In the event the doctor isn't being called as an expert I would request that the witnesses be sequestered.

COURT:

I don't think we need a sequestration.

ATTY SPENCER TO DR. W. K. REED:

Q. State your name.

A. Wm. Kohlman Reed.

Q. What is your occupation?

A. Physician.

ATTY KIEFFER:

I will stipulate he is a qualified and licensed practicing physician in the City and State.

ATTY SPENCER TO DR. W. K. REED:

Q. Were you treating defendant, Stephen Wainwright?

A. Before I answer that I have to get Mr. Wainwright's specific authorization to give any information.

STEPHEN R. WAINWRIGHT:

I give him my permission.

DR. W. K. REED:

Is that all I need — Verbal?

COURT:

Yes.

DR. W. K. REED:

A. Yes, I did treat Mr. Wainwright on October 12, 1964.

ATTY SPENCER TO DR. W, K. REED:

Q. What were you treating him for doctor?

A. For a common skin rash. Tinea Versicolor, which is a mild fungii infection of the top layer of the skin.

Q. On what part of the body was this found?

A. Primarily around his shoulders; under his arms and over his chest — front and back.

Q. Was this skin rash visible?

A. Both visible and invisible. Some was visible and some of it wasn't, I am sure.

Q. When it does become visible it doesn't appear as ordinary skin?

A. No, as ulcered skin.

Q. Is this unpleasant to look at?

A. It depends upon the sense of the individual. I have had this same thing 3 or 4 times. I found it only mildly objectionable. It didn't stop me from taking off and exposing that part of my body at the beach or anything like that.

Q. Have you ever come across people who find it objectionable?

A. I have. It depends upon the individual.

Q. No further questions of this witness.

COURT TO DR. W. K. REED:

Q. If he had a T-shirt on would one see his ailment?

A. Yes, if you were looking for it.

Q. If you weren't looking for it?

A. It all depends. This is a fungus that grows on the top layer of skin.

ATTY KIEFFER TO DR. W. K. REED:

Q. To what extent would medication relieve objection of this appearance of fungus?

A. If he used medicine as directed it would probably be gone in about a week, that is only the first part because you still have speckling and subsequent visits to the office.

Q. Your testimony is, Doctor, that; speaking in your professional opinion, inasmuch as you saw him on Oct. 12, 1964, in your experience and professional opinion this speckling was, or would be apparent 24 hours later?

A. Yes.

Q. 36 hours later?

A. Yes.

Q. 48 hours?

A. Yes. Seven days later.

Q. The speckling — is it a dark color?

A. Whiter color than surrounding skin.

Q. White like paper against my skin here?

A. Yes.

Q. In that respect it would have to be under fairly good lighting conditions for one to even see it? At night you couldn't see it pitch black?

A. No.

Q. If we turn the lights off in this Courtroom right now would it be apparent?

A. With acute vision I suppose one could see it if you were looking for it, yes.

ATTORNEY SPENCER TO DR. W. K. REED:

Q. Would a blow to the infected part of the skin tend to inflame the rash?

A. No.

DR. RICHARD M. LEVY, DULY SWORN, TESTIFIED:

ATTY KIEFFER:

I would like the record to reflect the Judge's statement regarding sequestration of wit-

nesses after the city asked that they be sequestered before the testimony of Dr. Reed.

COURT:

The record already reflects this Mr. Keiffer.

ATTY SPENCER TO DR. RICHARD M. LEVY:

Q. State your full name.

A. Richard Martin Levy.

Q. What is your occupation?

A. Physician.

Q. What is your specialty?

A. Orthopedic surgery.

Q. Do you know defendant, Stephen Wainwright?

A. Yes.

Q. Did you have occasion to see him on Oct. 13, 1964?

A. Yes. I examined Stephen at Touro on that day.

Q. Do you know about what time?

A. According to the record I have, he arrived at Touro at a quarter to five in the morning. It was some time after that that I examined him — about an hour or an hour and a half later.

ATTY KIEFFER:

Q. What date, Doctor?

DR. RICHARD M. LEVY:

A. October 13th —

ATTY SPENCER TO DR. R. M. LEVY:

Q. Did defendant relate to you a history of an injury and if so what?

A. I don't believe I can tell you the whole story since I didn't write it down. He told me he was picked up by the police, treated very badly and he was beaten on the right hand, wrist, left shoulder, upper-back.

Q. Were there objective symptoms of these injuries?

A. Objective symptoms don't go together. Objectives are findings. Symptoms are complaints. Plaintiff did complain of injury in this area. There was evidence of tenderness to pressure about the shoulder and back and about hand and wrist.

Q. Any restriction of motion?

A. Yes restriction in all three areas.

Q. Was there muscle spasm present?

A. No evidence of that.

Q. Can you state with reasonable medical certainty whether defendant's limbs had been subjected to some kind of reasonable trauma?

A. A sprain of the shoulder or strain. These words are used inter-changeably. From the story he gave me I felt he sustained some trauma to these areas.

Q. No further questions.

ATTY KIEFFER TO DR. R. M. LEVY:

Q. This man consulted you as an orthopedist and not as a physician?

A. Correct.

Q. You are frequently confronted or consulted by patients in your capacity as physician, and when they walk into your office the matter then is to find out why they are there — right?

A. Correct.

Q. You never have any reason whatsoever to doubt the reason that they have expressed — right?

ATTY SPENCER:

I object.

COURT:

Overruled answer the question.

DR. R. M. LEVY:

That is correct. I take the history they give me at face value.

ATTY KIEFFER TO DR. R. M. LEVY:

Q. Insofar as Mr. Wainwright is concerned, you had no reason at all to go beyond what he had said and you simply noted it in your record?

A. Correct.

Q. You are here to reveal what he told you?

A. Correct.

Q. You have no reason to believe it any more than you have to dis-believe it — right?

ATTY SPENCER:

I object.

COURT:

Overruled.

DR. R. M. LEVY:

I believe it because he told me. I didn't question it.

ATTY KIEFFER TO DR. R. M. LEVY:

Q. You have no reason to believe or dis-believe it?

A. Correct.

Q. You proceeded further to examine this patient insofar as what you believed to be objective elements which would lead you to your diagnosis. Is that correct?

A. Right.

Q. Then you made your prognosis?

A. Correct.

Q. Then you prescribed whatever you thought?

A. Yes.

Q. What did you prescribe?

A. I put a sling on patient. I don't know whether or not I gave him a prescription for medication

or not. I don't keep records for that. I asked him to return to see me at my home later in the day.

Q. This sling was put on his arm?

A. Yes.

Q. For what purpose was it put on?

A. Because of his shoulder.

Q. What happened after that?

A. He continued under my care. I again saw him several days later. He complained of numbness in his hand. He had complained of this earlier and it was noted he had a degree of sensitiveness over a certain area and Dr. Williams and I felt this was due to bruising of a small sensory nerve. For this there was no treatment and this contussion would subside and there would be no residue.

Patient complained of trauma to this scrotum. Since I am not trained for this, I referred him to Dr. Tomsky, who is a urologist. I did see Mr. Wainwright following another injury which had nothing to do with this. He told me his left shoulder recovered, but he was still having difficulty with his right hand. When I examined it I found nothing objective in his right hand. October 30th was the last time I saw the patient.

Q. October 30, 1964?

A. Correct.

Q. Did you refer him to any other consultants?

A. No, sir, I didn't.

Q. Did he see anyone else in your office?

A. Dr. Williams and myself.

Q. Did you observe the fungus condition which you just sat here in Court and heard Dr. Reed testify about, on the day you examined him?

A. No, I didn't, but this wouldn't be unusual.

Q. No further questions?

OFFICER E. BOEPPLE, DULY SWORN, TESTIFIED:

ATTY SPENCER:

Officer Beopple I would like to refer to something we discussed last Friday. You stated you had discussed what occurred on the night of Oct. 13th relating to defendant with Officer Martello and the City Attorney, etc. is that correct?

OFFICER BOEPPLE:

I did say that. Yes, I said that.

ATTY KIEFFER:

I object.

COURT:

Permit this, and proceed to another question.

ATTY SPENCER TO OFFICER BOEPPLE:

Q. What other persons did you discuss the case with besides Lt. Martello and the City Atty?

ATTY KIEFFER:

I object.

COURT:

I will permit it. Answer the question.

OFFICER BOEPPLE:

With Mr. Otteson, the other officer.

ATTY SPENCER TO OFFICER BOEPPLE:

Q. What about Detective Kent?

A. No, sir.

Q. What about Detective Townsend?

A. No, sir.

Q. Patrolman O'Rourke?

A. No, sir.

Q. Patrolman Gilford?

A. Briefly.

Q. With all of these people?

A. Just the ones who I state.

Q. Immediately prior to the trial on May 7th is that correct?

A. Yes.

Q. Mr. Boepple were you called as a witness in this case on December 4th?

A. No, sir.

Q. You weren't present?

A. I was here, but not called as a witness.

Q. Were you separate from the courtroom?

A. I was.

Q. Were you at that time given instructions not to discuss the case with each other?

COURT:

Officer Boepple were you told not to discuss this case with other officers while you were separated?

OFFICER BOEPPLE:

Yes.

ATTY SPENCER TO OFFICER E. BOEPPLE:

Q. Have you discussed this case with any officers involved since May 7th?

A. No, sir.

Q. You didn't discuss it with the City Atty?

A. No, sir.

Q. You haven't advised Mr. Marbello or Otteson as to what your testimony was?

A. No, sir.

Q. I believe you stated that after you put defendant under arrest he started to walk away and

this is why you charged him with resisting arrest?

A. As he attempted to walk off from us, yes.

Q. You had already informed him he was under arrest?

A. Yes.

Q. Did you inform him as to what he was under arrest for?

A. Vagrancy by loitering.

Q. What was it he did that constituted loitering in your opinion?

A. We observed him standing in the 600 block of Bourbon Street; subject had no identification on his person. He couldn't show us any thing.

Q. What was it that constituted loitering?

A. Observed him standing in the 600 block of Bourbon St. I tried to get some identification. He would not show us any. He said he didn't have any to show. We questioned him about what he was doing there. After some reluctance he said he was going to a restaurant to get something to eat.

Q. Was there any thing else that led you to believe he was guilty of loitering?

ATTY KIEFFER:

I object.

COURT:

Sustained.

ATTY SPENCER TO OFFICER E. BOEPPLE:

Q. Was it your testimony May 7th, you saw defendant standing put not more than 5 to 10 seconds?

A. It was.

Q. What was it that defendant did for you to charge him with reviling the police?

A. On the route to the station he called me a stupid cop.

Q. He called you that?

A. He referred to me and my partner.

Q. Did he say any thing else?

A. No, sir.

Q. There was no one else present but you and Officer Ottesen?

A. Correct. We were in the police vehicle.

Q. I have no further questions of this witness at this time. It may be possible that I'll want to recall him later.

OFFICER JOHN OTTERSON, DULY SWORN, TESTIFIED:

ATTY SPENCER:

I want the record to show I object in view of the fact it has been testified to that he has discussed the case with another witness in this case since inception of this trial.

COURT:

I will permit him to testify.

ATTY KIEFFER TO OFFICER JOHN OTTESON:

Q. State your full name.

A. John Otteson.

Q. You are a member of the N. O. Police Dept?

A. I am.

Q. So employed on Tuesday, Oct. 13, 1964?

A. Yes.

Q. You are familiar with the incident, which occurred in the vicinity of Toulouse and Bourbon Streets in this City at approximately 12:45 A. M. on that date?

A. Yes, I am.

Q. It involved Mr. Wainwright, defendant herein?
A. Correct.

Q. Would you please tell the Court who you were with at the time you confronted Mr. Wainwright?
A. With my partner, Ptn. Elmo Boepple.

Q. Please relate to the Court where Mr. Wainwright was and where you were when you first saw him?
A. My partner and I were cruising down Bourbon St. We had just passed Toulouse. We observed defendant, Mr. Wainwright on the left hand side of the street near the corner. The Lake side of the street.

Q. After you observed defendant what followed then?
A. My partner and I had been given a photograph of a subject wanted in connection with a murder which had happened 3 days prior to the 13th.

ATTY KIEFFER:
Go ahead.

OFFICER OTTESON:
We stopped the car. He was standing on the sidewalk.

ATTY KIEFFER TO OFFICER JOHN OTTESON:
Q. You observed him first?
A. Both of us saw him just about the same time.
Q. You got out of the car first?
A. I got out of the car because my partner was driving.
Q. Where was the car at the time you say that you came upon him?
A. We didn't exactly pass him up. I got out of

the car and went over to him. I asked him what his name was, while my partner parked the car. He stated his name was Stephen Wainwright, he was a law student. My partner came up and we asked him if he had identification on him. Subject said he didn't have any. We searched him. He didn't have any identification whatsoever. During questioning several times he tried to walk off from us. I asked him "Couldn't you cooperate and answer these questions"? He said I would be humiliated by the police. He was very nervous. My partner went back to the car and got the picture of the subject that he fit the description of as far as looks, and from his actions we thought he needed further checking out.

Q. How was he attired?

A. Black denims, a jacket, you could see part of a T-shirt showing. He did have a T-shirt. I don't know whether it was showing at that time or not. He had a wind-breaker jacket and black pants. I believe Ivy League pants.

Q. Do you recognize this?
(Attorney Kieffer exhibits composite.)

ATTY SPENCER:

I object.

COURT:

Overruled. The reason is Article 60 of the Criminal Code of Procedure and Article 108 of Criminal Code Book 15. Proceed.

OFFICER OTTESON:

Yes, I recognize it.

ATTY KIEFFER:

Let the record reflect the witness is looking at what has heretofore been identified and marked "Exhibit A". Do you recognize this?

OFFICER OTTESON:

Yes, I do.

ATTY KIEFFER TO OFFICER J. OTTESON:

Q. What is that?

A. Photostatic copy of a subject wanted in connection with a murder.

Q. Was it your belief at the time that Mr. Wainwright resembled this wanted subject?

ATTY SPENCER:

I object: It is immaterial.

COURT:

Overruled. Answer.

OFFICER OTTESON:

Yes. We also had another photograph of subject named Johnnie Mack Taylor in our possession besides this photograph.

ATTY KIEFFER:

I would like to offer, and introduce in evidence the composite of wanted subject heretofore marked "City Exhibit A" for purposes of identification.

ATTY SPENCER:

I object. It is irrelevant and immaterial.

COURT:

Overruled. File offer and introduce the composite into the record, Make your objection.

ATTY SPENCER:

My objection is it is irrelevant and immaterial to charges against defendant to date. I have no other objections.

COURT:

That is what you said. Proceed.

ATTY KIEFFER TO OFFICER J. OTTESON:

Q. After you interrogated Mr. Wainwright, what did you do?

A. We proceeded to place him into the police car.

Q. Was he under arrest at that point?

A. Yes, he was loitering at that location, since he didn't have any identification on him and also he had very little funds. He said he was going to get a cup of coffee, I believe.

Q. After you put him into the car, where did you proceed with him?

A. To the First District Station. While proceeding subject stated "You stupid cops." I asked him "What did you say?" He said I'm stupid, or something like that.

Q. When you say "I am stupid" clarify that.

A. He meant in other words * * *

Q. Referring to you being stupid, when you say "I am stupid".

A. Subject stated he was the stupid one. At first he said, "You stupid Cops." Both of us said, "What did you say?" He said, "I'm stupid." In other words the defendant said that.

Q. While you were interrogating him, was he cooperative, and obedient, did he answer your questions responsively?

ATTY SPENCER:

I object. It's irrelevant and immaterial.

COURT:

Sustained.

ATTY KIEFFER TO OFFICER J. OTTESON:

Q. Describe the conduct of defendant, Mr. Wainwright, while you were asking him questions at the scene, where you first observed him.

ATTY SPENCER:

I object.

COURT:

Overruled. Answer.

OFFICER J. OTTESON:

While my partner and I were questioning him subject was very nervous and on several occasions he tried to walk away. He said he didn't want to be humiliated by the police. I asked him how could questioning be humiliating? He didn't have any answer for that.

Q. No further questions.

ATTY SPENCER:

I will defer my cross-examination until City is finished.

COURT:

You will have to cross-examine him now.

ATTY SPENCER:

I will proceed then..

ATTY SPENCER TO OFFICER J. OTTESON:

Q. Mr. Otteson when you first noticed defendant, what was he doing?

A. Standing near the corner. He wasn't doing anything in particular.

Q. Was he at the corner of the block or 20 or 30 feet away?

A. I couldn't say exactly. He was standing near the Ivanhoe at Toulouse and Bourbon.

Q. How long did you observe him to be standing there?.

A. While we passed, that is the only time we ever saw him.

Q. How long would you say that was?

A. 5 or 10 seconds.

Q. Did you stop your car?

A. My partner did.

Q. You got out first?

A. Correct.

Q. You went back and asked defendant what he was doing there?

A. Correct.

Q. What did he say he was doing there?

A. On his way to get some coffee I believe.

Q. What did you do then?

A. I asked him what his name was.

Q. Did he tell you?

A. He told us his name.

Q. Did you state you had searched him and he didn't have any identification on him?

A. Correct.

Q. At what point did you search him? Was it there on the street?

A. Yes.

Q. How did you go about searching him? Did you have him put his hands against the wall?

A. We gave him a quick frisk.

Q. You didn't find any identification at all?

A. We checked for weapons. We asked him for identification, and he said he didn't have any.

Q. Was he already under arrest when you searched him?

A. Yes.

Q. What did you arrest him for?

A. With loitering.

Q. Nothing else — just loitering?

A. While he was on the street he tried to walk away several times, that would be a form of resistance.

Q. Was this before or after you had arrested him for loitering. When he committed the acts you

say are forms of resisting arrest? Which did you do first? Did you arrest him before he did this, or did he walk away before being informed he was under arrest?

A. I believe we told him he was under arrest for the loitering charge and then he * * * I don't really know.

Q. You don't know whether he started to walk away before or after he was told he was under arrest, is that correct?

A. Correct.

Q. You stated he had on black pants, T-shirt and a wind-breaker. Please describe that wind-breaker?

A. Tan wind-breaker. This was seven months ago.

Q. Did it have a colored insigna on it?

A. Not to my knowledge.

Q. You don't know whether it did or not?

A. No, sir.

Q. Did defendant do anything other than attempt to walk away from you to constitute resisting?

A. No, sir, not on the street.

Q. At the time he started to walk away you didn't have your hand on him, did you?

A. I never put my hands on him. I put my hand against the wall by the Ivanhoe, so he wouldn't walk away.

Q. As soon as you did that he stopped, is that right?

A. He didn't try to strike me or anything.

Q. When you told him to get into the car he did that, didn't he?

A. Correct.

Q. No further questions at this time.

LT. FRANCIS L. MARTELLO, DULY SWORN, TESTIFIED:

ATTY KIEFFER TO LT. FRANCIS L. MARTELLO:

Q. You are a member of the New Orleans Police Dept. so employed on Oct. 13, 1964?

A. Yes.

Q. How long have you been an officer?

A. Going on 17 years.

Q. What is your rank?

A. Lieutenant.

Q. Where were you at the time of this incident?

A. Assigned to the First District Police Station.

Q. In what capacity?

A. Platoon Commander at the First District.

Q. In full uniform?

A. Yes.

Q. You are familiar with the incident which occurred at the First District Police Station involving one Stephen Wainwright?

A. Yes.

ATTY SPENCER:

I object.

COURT:

Let me see the affidavits.

ATTY KIEFFER:

I wish to amend.

ATTY SPENCER:

I object.

COURT:

Which one do you wish to amend, Mr. Kieffer.

ATTY KIEFFER:

Resisting arrest and reviling the police.

ATTY SPENCER:

I object. This is an entire new charge.

COURT:

I agree with Mr. Spencer.

(RECESS)

COURT TO LT. FRANCIS MARTELLO:

Q. Are these the affidavits you wish to perfect?

A. Yes.

ATTY SPENCER:

Mr. Kieffer, do you rest your case here today?

ATTY KIEFFER:

I did rest my case.

ATTY SPENCER:

I move for a dismissal on the grounds that the City has failed —

COURT:

I will take that under advisement. Mr. Kieffer, what do you wish to do with these 3 charges? Mr. Spencer, is the defendant ready for these 3 new charges? Let's arraign the defendant Wainwright, Mr. Cipriano.

SAM CIPRIANO, CLERK TO DEFENDANT STEPHEN R. WAINWRIGHT:

Q. How do you plead to charge of disturbing the peace by assault on Patn. Frank Gilford on Tues. the 13th day of Oct. 1964 about 1:25 o'clock A. M. at the First District Police Station?

A. Not guilty.

Q. How do you plead to charge of disturbing the peace by assault on Patn. Geo. O'Rourke on Tuesday the 13th day of Oct. 1964 about 1:25 o'clock A. M. at the First District Police Station?

A. Not guilty.

Q. How do you plead to the charge of resisting an officer on Tuesday the 13th of Oct. 1964 at about 1:25 o'clock A.M. on Basin and St. Louis?

A. Not guilty.

ATTY KIEFFER:

We move for a continuance in these matters in as much as the City isn't prepared to go to trial at this time.

COURT:

Let these fall to whichever Court they are allotted to.

ATTY SPENCER:

I assume I will be allowed to file objections to these new affidavits in this case.

COURT:

Sure. You may have some objections that are good. Is that the business of the day, Mr. Kieffer?

ATTY KIEFFER:

Yes.

SUPREME COURT, U. S.

FILED

JUL 25 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. 13

STEPHEN R. WAINWRIGHT,

Petitioner,

—v.—

CITY OF NEW ORLEANS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 13

STEPHEN R. WAINWRIGHT,

Petitioner,

—v.—

CITY OF NEW ORLEANS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Criminal District Court for the Parish of Orleans (R. 54-60) is unreported. The order of the Supreme Court of Louisiana denying petitioner's application for writs of certiorari, prohibition and mandamus (R. 71) is reported at 184 So. 2d 23.

Jurisdiction

The order of the Supreme Court of Louisiana denying petitioner's application for writs of certiorari, prohibition and mandamus was entered on March 24, 1966. The Petition for Certiorari was filed in this Court on June 21, 1966

and certiorari was granted on January 9, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1257(3).

Questions Presented

1. When a person is stopped on the sidewalk by the police "on suspicion" and questioned, to what extent must the person cooperate? Must he answer all questions? If he has no identification, must he strip to his undershirt on the sidewalk and let the police inspect him for identifying marks, or is this an unreasonable search?

2. When this person, without identification, is mistaken for a wanted man, and he tells the police his name, address and occupation, but refuses to remove any of his clothing, can he legally be arrested "on suspicion," charged with vagrancy, and taken to jail for further investigation, or is this a denial of due process?

3. When this person arrives in the police station, does he have the right immediately to call his lawyer to prove his identity, or does he first have to submit to the removal of some of his clothing, to the inspection of his body for identifying marks, and to being booked?

4. When this person refuses, because he suffers from an unsightly skin disease, to remove his clothing and submit to this examination for identifying marks, before being allowed to call counsel to prove his identity, and the officers use force to remove his clothing, is this an unreasonable search which the person may resist?

5. When this person resists the inspection of his body by merely folding his arms across his chest in trying to

keep his clothing on, and he is convicted of the crime of disturbing the peace by assault for these actions, is this a denial of due process, in that there was a total lack of evidence of the elements of disturbing the peace by assault?

Statutes Involved

Section 42-25 of the Code of the City of New Orleans—Disturbing Public Peace:

> No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another.

Section 42-85 of the Code of the City of New Orleans—Vagrancy:

> The following persons shall be guilty of vagrancy:
>
> • • • • • •
>
> (7) Persons who loaf the streets habitually or frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly without lawful business or reasons to be present . . .

Statement of the Case[1]

On the night of October 12, 1964, at about midnight, petitioner, a graduate student at Tulane University Law School, left his apartment in the French Quarter of New Orleans (B. 140). About four blocks from his apartment,

[1] The symbol "B" refers to the Appendix of Respondent's "Response in Opposition to the Issuance of a Writ of Certiorari" in this Court. That Appendix contains the transcript of record of

he was stopped by two officers of the New Orleans Police Department, Officers Boepple and Otteson (B. 147). According to the officers, they wanted to question petitioner who "resembled" a composite picture of a man who had allegedly committed a murder (B. 136).[2]

Officer Boepple testified that petitioner freely gave his name (B. 139).[3] When asked where he lived, petitioner first responded, "in the French Quarter" (B. 139), and then gave his precise address, which Officer Boepple believed truthful (B. 147). When asked next whether he was carrying any identification, petitioner began to walk away. The officers stepped in his path to prevent his leaving. Petitioner again tried to walk away saying, "the law says I must only give you my name and address; that is all I am required to give you" (B. 140). The police again detained him.

Officer Boepple then asked petitioner what he was doing on the street at that time of night to which petitioner answered that he was "going to get something to eat" (B. 140). At that point Officer Boepple walked to his patrol car, returned with the composite picture, and told petitioner that "the reason we question you is because you fit

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the partial trial of predecessor charges against petitioner without which the charges at bar cannot be fully understood. The material in that Appendix was inadvertently omitted from the Transcript of Record in this case. References to the latter Transcript of Record are designated by the symbol "R".

[2] In fact, it had "never been clarified whether the man we had been looking for as the murder suspect, is the man who committed the murder. It is still an open case" (R. 25).

[3] Petitioner also mentioned that he was a law student. Boepple was sceptical because he thought petitioner, who was dressed in a white denim jacket, a T-shirt, and a pair of dress slacks, "was not dressed as a law student" (B. 141).

the description of an individual who committed a murder a week or so previous" (B. 140-141). In order to have petitioner verify that he "wasn't the subject we were looking for . . . ," Boepple asked for his draft card, but petitioner did not have it with him. The officers searched petitioner and found he had no identification whatever (B. 172, 176).

Officer Boepple told petitioner that the man they were looking for had a tattoo on his left forearm which read "Born to raise hell" and asked petitioner to remove his jacket so they could discover whether he had such a tattoo. Petitioner refused, saying, "I refuse to allow myself to be molested by a bunch of cops here on the street" (B. 141). Petitioner also said, according to Officer Otteson, that he "didn't want to be humiliated by the police" (B. 175).[4]

Officer Boepple then said that he was left with "no alternative" but to arrest petitioner and take him to the station house (B. 141).

The charges for which petitioner was arrested were vagrancy by loitering and resisting an officer (B. 148).

The charge of vagrancy by loitering was based on the fact that petitioner "was standing still for five seconds" (B. 149), that he "couldn't show me any identification to verify whom he was" (B. 149, 169) and that "he had very little funds" (B. 174).

The charge of resisting was based on petitioner's "turning and walking away" (B. 148), though the officers were

[4] Petitioner's fear of humiliation was related, among other things, to an unsightly skin ailment from which he was suffering and which would have been visible had he taken off his jacket (B. 161-162).

unable to say whether petitioner tried to walk away "before or after he was told he was under arrest" (B. 177).

When inside the patrol car and persuaded that he was actually being arrested, the petitioner said, according to the police, "All right, you stupid cops" (B. 142). Upon hearing that, Officer Boepple told petitioner that he would also be charged with reviling the police (B. 142).

When the patrol car arrived at the station house, petitioner offered to produce identification if the officers would take him home (B. 147), but the offer was rejected because "the man was already under arrest at that time" (B. 148).

The officers took petitioner into the station house and put him in the interrogation room. Petitioner immediately asked to be allowed to telephone his attorney, but was told he could not do so until he had been booked (B. 142; R. 34, 36). Petitioner was kept in the interrogation room ten or fifteen minutes (R. 36) during which time he was interrogated "about possible murder suspect" (R. 39), and then booked (R. 16, 28).

Immediately after booking, Lieutenant Martello told petitioner to remove his jacket so that the officers could see if there was a tattoo on his arm (R. 16-17, 21). Petitioner refused to remove his jacket and again demanded the right to use the telephone (R. 20). Lieutenant Martello ordered two officers to forcibly remove the jacket. Petitioner resisted by crouching in a corner, folding his arms and holding his jacket to him as the officers approached to remove it. Petitioner did not strike out or kick the officers (R. 22-23, 30), but the four or five officers now attempting to remove the jacket "got thrown around the room" through the

combination of their efforts to remove the jacket and petitioner's resistance (R. 22).[5]

After the jacket was removed and the officers found that petitioner was not tattooed, he was permitted to telephone his lawyer (R. 31). He was then taken to another police building to be photographed and fingerprinted.

Petitioner's attorney arrived at about 1:45 A.M. at the police station to which petitioner had first been taken but found he was not there (B. 98). Insistent about seeing his client, the lawyer was himself arrested, charged, and later convicted of reviling the police and refusing to move on. The latter charge was based on his refusal to leave the police station.[6]

At about 4:45 A.M. on the morning of October 13th, after petitioner and his attorney had been released from custody, petitioner was examined by his doctor (B. 163) who found evidence of injury to his shoulder, back, hand and wrist. Petitioner told the doctor that the injuries had been inflicted by the police (B. 163).

Petitioner's trial on the charges of vagrancy, resisting arrest and reviling the police was first heard on December 4, 1964, in Municipal Court. After partial testimony was heard (B. 129-134), the trial was adjourned. It was re-

[5] Two police officers from the homicide bureau who were assigned to the murder (R. 26) were called to the police station, but petitioner was forcibly searched before they arrived. When one of the arresting officers was asked whether "these two officers could have identified that murder suspect," an objection to the question was sustained (R. 34).

[6] The transcript of the attorney's trial and conviction is found at B. 91-127. The conviction was reversed on appeal.

sumed on May 7, 1965, when the court heard further partial testimony and once more adjourned the trial over objection by petitioner's lawyer (B. 149). The trial was resumed once more on May 14, 1965 (B. 151). At the close of the state's case on that day (B. 179), the three original charges were discontinued—in Respondent's words, they have been "long abandoned" (B. iii)—and three new charges growing out of the events inside the police station were lodged against petitioner. Those charges consisted of two charges of disturbing the peace by assault on police officers and one charge of resisting an officer (B. 179-180). Petitioner was subsequently convicted of those three charges (R. 40). On appeal to the Criminal District Court, the conviction for resisting an officer was reversed (R. 56), and the convictions for disturbing the peace were affirmed (R. 60). It is the convictions for disturbing the peace which are before the Court in this case.

On appeal to the Criminal District Court, petitioner claimed that his arrest was unlawful because not based upon probable cause (Petition for Certiorari, pp. 37, 38), that the search in the station house was unlawful and that petitioner had the right to resist it (*id.* at 38),[7] and that "the police refusal to allow the defendant to contact his attorney . . . " was a "violation of his constitutional and statutory right . . . " (*id.* at 38).

In his application to the Supreme Court of Louisiana for writs of certiorari, prohibition and mandamus, petitioner assigned the following errors (R. 64-65):

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[7] Citing *Wright* v. *Georgia*, 373 U. S. 284 (1963), for both these propositions.

(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

(3) The defendant was denied his constitutional right to due process in that:

(a) The defendant was denied his right to have counsel present from the moment of his arrest.

(b) The defendant was deprived of his right not to be subject to unlawful search.

(c) The defendant was deprived of his right to a speedy trial.

(d) The defendant was deprived of his right to an impartial trial.

The Criminal District Court held both that petitioner's arrest (R. 54-56) and the station-house search (R. 57) were lawful. The Supreme Court of Louisiana, in its order denying the writs, said that "The ruling of the Criminal District Court for the Parish of Orleans is correct" (R. 71).

Summary of Argument

I. Though petitioner adequately identified himself to police officers looking for a murder suspect, he was arrested on a baseless charge of vagrancy and taken to the police station for further investigation. There was no probable cause to arrest petitioner for either vagrancy, *Thompson* v. *Louisville,* 362 U. S. 199 (1960), or for murder, *Beck* v. *Ohio,* 379 U. S. 89 (1964). Petitioner was arrested on "mere suspicion." *Wong Sun* v. *United States,* 371 U. S. 471 (1963). The valid interests of the police could have been satisfied by alternative and constitutional means.

II. Because the search of petitioner was incidental to an unlawful arrest, it was itself unlawful, *United States* v. *di Re,* 332 U. S. 581 (1948), and could lawfully be resisted. *United States* v. *di Re, supra; Wright* v. *Georgia,* 373 U. S. 284 (1963); *John Bad Elk* v. *United States,* 177 U. S. 529 (1900). The absence of a right to resist an unlawful search encourages police lawlessness.

III. Petitioner's conviction is invalid because he was denied the assistance of counsel when the "focus" of investigation was upon him, *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), when the denial of counsel "derogated his right to a fair trial," *United States* v. *Wade,* 35 U. S. L. Week 4597, and when the denial affected "counsel's ability to assist petitioner in respect of . . . rights he did possess."

ARGUMENT

I.

Petitioner was arrested without probable cause.

The facts of this case sharply demonstrate police conduct used to evade the mandate of the Fourth Amendment. As stated by Mr. Justice Douglas in *Carignan* v. *United States*, 342 U. S. 36, 46 (1951), it is the "time-honored police method . . . to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime."

Thus, the police officers here had the barest suspicion, based upon a composite picture in their possession, that petitioner resembled a man involved in some ambiguous way in a murder (R. 25). Dissatisfied with petitioner's reasonable and truthful answers to questions put by them which in fact established his identity, the police arrested petitioner on a wholly unrelated and spurious charge of vagrancy by loitering in order to allow them to pursue the murder investigation in the privacy of the police station.[8]

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[8] The issue has been the subject of several studies: Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union (1959); Report and Recommendations of the [District of Columbia] Commissioner's Committee on Police Arrests for Investigation (1962). See Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L. J. 1 (1960).

To the extent that petitioner was first interrupted by police on the street and interrogated without probable cause, this case bears resemblance to the three "stop and frisk" cases before the Court this Term (*People* v. *Sibron*, No. 63; *People* v. *Peters*, No. 74; *Terry* v. *Ohio*, No. 67). The cases diverge, however, since the central issue here is not the use at trial of evidence seized in the course of a warrantless, non-consensual, non-probable cause street detention, interrogation, and search. Rather, petitioner was arrested precisely because the street search and interrogation, as far as the officers were concerned, was fruitless. See American

Conduct of this kind exceeds even that which this Court condemned, in a non-Fourth Amendment context, in *Culombe* v. *Connecticut*, 367 U. S. 568, 631 (1961), where petitioner was taken not before a magistrate but rather "before the New Britain Police Court on the palpable ruse of a breach of the peace charge concocted to give the police time to pursue their investigation," even though probable cause apparently did exist for the crime for which the arrest was actually made. See too *Johnson* v. *United States*, 370 F. 2d 489 (D. C. Cir. 1966); *Cook* v. *United States*, 346 F. 2d 563 (10th Cir. 1965); *U. S. ex rel. Weinstein* v. *Fay*, 333 F. 2d 815, 818-819 (2nd Cir. 1964).

The charge of vagrancy, upon which petitioner was technically arrested, was entirely frivolous. Whatever one may say of vagrancy statutes,[9] a charge based upon the observation of a man standing still in the street for five seconds (B. 149), whether or not he is carrying identification or "very little funds," is so baseless it must fall as a matter of due process. *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Fields* v. *Fairfield*, 375 U. S. 248 (1963).

Nor can petitioner's arrest be justified as validly related to the murder said to have been under investigation by the police, for there was no probable cause whatever to arrest petitioner for murder. Probable cause to arrest without a

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Law Institute: A Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1), p. 95 n. 12.

[9] Two vagrancy statutes have recently been held unconstitutional. *District of Columbia* v. *Hicks*, Cr. No. DC 34194-66 (D. C. Ct. of Gen. Sess., May 4, 1967); *Fenster* v. *Leary*, No. 248 (N. Y. Ct. of App., July 7, 1967).

warrant exists when "at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964).

In addition to the fact that the police themselves did not claim to have arrested petitioner for murder, objective assessment of the information within their knowledge establishes conclusively that probable cause did not exist.

The facts within the knowledge of the police when they stopped petitioner were these: (1) They had been given the name of a man they believed was wanted for murder;[10] (2) They had been given a composite picture and photograph of the man; (3) They had been told that the man had a tattoo on his left forearm which said "Born to raise hell." On the other hand, the police knew nothing at all about petitioner except the suspicion, at the moment they first saw him, that he resembled the composite picture in their possession. The refusal of petitioner to expose his forearm cannot be said to have supplied the information necessary to raise the officer's belief to the level of probable cause. As the facts of the case show, the refusal was more consistent with innocent than guilty behavior. At worst, it can be said to be ambiguous conduct, but as was said in *Wong Sun* v. *United States*, 371 U. S. 471, 484 (1963), "A contrary holding here would mean that a vague suspicion

[10] In fact, it had "never been clarified whether the man we were looking for as the murder suspect, is the man who committed the murder. It is still open" (R. 25). In other words, the police were not looking for a man whom they believed had committed a murder. At most, he was wanted for questioning in connection with a murder.

could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked."

Taken together, therefore, the police had at best a "mere suspicion," a quantity of information constitutionally inadequate for arrest. *Wong Sun* v. *United States,* 371 U. S. 471 (1963). See too *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Henry* v. *United States,* 361 U. S. 98, 100-101 (1959); *Draper* v. *United States,* 358 U. S. 307 (1959); *Brinegar* v. *United States,* 338 U. S. 160 (1949).

In *Beck* v. *Ohio, supra,* the arresting officer had a photograph of the defendant, knew personally what the defendant looked like, knew that the defendant had a criminal record, and had "information" or "reports" about the defendant. On that basis, the defendant was arrested, taken to the station house, searched, and later convicted on the basis of betting slips discovered on his person. Holding the search unlawful, this Court characterized the information in the officers possession as too "scant" to uphold the warrantless arrest. "The record in this case," said the Court, "does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him." 379 U. S. at 95.

Though the police here did not have constitutional justification for arresting petitioner, they admittedly had a knotty practical problem in police investigation. They presumably believed that they might have stumbled across a man wanted in connection with a serious crime. They did not know or even have "strong reason to suspect"[11]

[11] *Henry* v. *United States, supra* at 101.

that petitioner was their man, but they wanted to be sure; and for that they cannot be faulted. There were several options open to them, however, which would have permitted successful police work without infringing on constitutional rights. For example, one of the officers might have followed petitioner while the other secured further information from police headquarters or, even more simply, looked in a New Orleans phone book to see whether petitioner's name and address were there. Or they might have suggested that petitioner return to his apartment voluntarily to secure the identification which would have satisfied them that he was who he said he was. Indeed, petitioner himself suggested this course before arrival at the police station but the officers rejected it because "he was already under arrest." Neither of these alternatives would have given the officers the immediate satisfaction they sought, but both were reasonable and constitutional ways of achieving their goal. The police must frequently accommodate the citizen in order to remain within the perimeter of the Fourth Amendment. If the protections of privacy devised from the Fourth Amendment are to remain meaningful, they cannot be subordinated to claims of police convenience.

II.

Under the Fourth Amendment, petitioner had the right to resist the unlawful search of his person.

Because petitioner was arrested without probable cause, any search incidental to that arrest was itself unlawful. *United States* v. *di Re*, 332 U. S. 581 (1948); *Johnson* v. *United States*, 333 U. S. 10 (1948); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *Henry* v. *United States*, 361 U. S. 98 (1959).[12]

Though this Court has never squarely held that one has the right to resist an unlawful search, it has said that "one

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[12] Though we contend the search was invalid because incidental to an unlawful arrest, the search was not in fact "incidental" to the arrest, unlawful or not. *Preston* v. *United States*, 376 U. S. 364 (1964); *Cooper* v. *California*, 87 S. Ct. 788 (1967). If it is said that the search was otherwise "reasonable," see *Cooper* v. *California*, *supra* at 790, because it is the customary procedure to search all prisoners in the police station (R. 16-17, 21), the short answer is that such a search is legitimated only when conducted subsequent to a lawful arrest. Thus, the search in *Cooper* was held "reasonable" only because the defendant's automobile was "validly held." 87 S. Ct. at 791.

Likewise, the search cannot be said to be validated by *Schmerber* v. *California*, 384 U. S. 757 (1966), because the decision in *Schmerber* was based on the assumption that the underlying arrest was lawful. The searches, said the Court, "depend antecedently upon seizures of 'persons' within the meaning of [the Fourth] Amendment." 384 U. S. at 767. Furthermore, a tattoo (if it had existed) would hardly "diminish" as would the percentage of alcohol in the blood. Therefore, the case at bar, assuming *arguendo* the lawfulness of the underlying arrest, is an example of one in which a search warrant should have been required since the delay necessary to obtain the warrant did not threaten "the destruction of evidence." 384 U. S. at 770. A "neutral and detached magistrate" (*ibid.*) might well have concluded that the police were mistaken in suspecting that petitioner was a murderer and he would thereby have been saved the invasion of his body.

has an undoubted right to resist an unlawful arrest". *United States* v. *di Re, supra* at 594. More recently the Court has held that, "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963).[13] Lower federal courts have held, however, that the right to resist an unlawful search is co-extensive with the right to resist an unlawful arrest. *Sparks* v. *United States*, 90 F. 2d 61 (6th Cir. 1937); *Briggs* v. *United States*, 24 F. 2d 961 (9th Cir. 1928); *Dovel* v. *United States*, 299 Fed. 948 (7th Cir. 1924).

Since it is the Fourth Amendment which limits the power of the state both to arrest and to search, *Henry* v. *United States, supra*, and since in both cases it is protection of "the privacy or security of the citizen"[14] which is at stake, the considerations which permit resistance to an unlawful arrest apply equally to resistance to an unlawful search.[15]

Admittedly, the right to resist an unlawful arrest or an unlawful search is not unlimited. The right extends only to "using no more force than [is] absolutely necessary to repel the assault constituting the attempt to arrest"[16] or, as in

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[13] See too *John Bad Elk* v. *United States*, 177 U. S. 529 (1900); *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965); *Foster* v. *United States*, 296 F. 2d 65, 67 (5th Cir. 1962); *Brown* v. *United States*, 47 F. 2d 681 (5th Cir. 1931); *Briggs* v. *United States*, 24 F. 2d 961 (9th Cir. 1928); *United States* v. *McCarthy*, 249 F. Supp. 199 (E. D. N. Y. 1966).

[14] *Henry* v. *United States, supra* at 102.

[15] The standards announced in the federal cases now of course apply to the States. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Ker* v. *California*, 374 U. S. 23 (1963); *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[16] *John Bad Elk* v. *United States, supra* at 535.

this case, the attempt to search. Petitioner did not exceed those limits (R. 22-23):

Cross Examination of Lt. Martello.

"Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it? A. He tried to keep it on by holding it.

"Q. How? A. By folding his arms. (demonstrates)

"Q. He didn't do anything else? A. No, not to my knowledge.

"Q. If Officer O'Rourke and Officer Gilford got thrown [fol. 27] around the room, it was through their own effort? A. No, it was the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

"Q. He didn't do anything but try to hold the jacket on? A. They tried to take it off, and he was trying to keep the jacket on.

"Q. He held very still? A. No, it was a struggle.

"Q. Did he strike out at the officers? A. No.

"Q. Did he kick the officers? A. I didn't see him. He could have. I didn't see him. It wasn't visible to me.

"Q. How many officers were involved in an attempt to take his jacket off of him? A. Officer Gilford, Officer O'Rourke, Officer Wilson and Mr. Kent—four."

The right to resist an unlawful arrest is recognized in 45 of the 50 states.[17] *The Right to Resist an Unlawful*

[17] Louisiana is one of the 45 states. *City of Monroe* v. *Ducas*, 203 La. 974; 14 So. 2d 781 (1943).

Arrest: An Outdated Concept, 3 Tulsa L. J. 40, 46 (1966). The reasons for this virtual unanimity are compelling and go to the heart of the purpose of the Fourth Amendment: "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California, supra* at 767.

If a citizen chooses to exercise the right to resist an unlawful search by refusing to submit to it, is it not offensive to permit him to be convicted of "disturbing the public peace," or any other offense which is a direct result of his resistance? At common law no crime was committed because the unlawful arrest and search constituted an assault, and reasonable resistance was an act of self-defense. See *John Bad Elk* v. *United States, supra*.

Any other rule would encourage police brutality, as well as wholesale violations of the Fourth Amendment. If it is unlawful to resist an unconstitutional arrest and search, it is to the advantage of the police to seize a suspect and search him by force. If contraband or other evidence of crime is found, and the suspect cannot be convicted for its possession because of the invalidity of the seizure, he can nonetheless be jailed for breach of the peace or resisting the officers.

The Court of Appeals of the State of New York, in *People* v. *Cherry*, 307 N. Y. 308, 311 (1954), a leading case establishing the right to resist an unlawful arrest, has said:

> "For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under color of law—to be resisted as energetically as a violent assault."

There is a point at which this statement becomes true of nearly every citizen. Tolerance of high-handedness may vary from person to person, but there comes a time when every person, if he values his liberty at all, will refuse to submit. To permit such a refusal to be made unlawful is to put a premium upon official arbitrariness. The more unreasonable the actions of the police, the more likely the citizen is to resist, and the easier the conviction for resisting an unlawful arrest. Under circumstances like those in the present case, many citizens could predictably be expected to resist to some degree, and the police will in fact have created a situation in which resistance is nearly inevitable. A conviction based upon resistance to such an arrest is obtained virtually by entrapment. But for the provocative behavior of the police, there would be no crime. *Cox* v. *Louisiana,* 379 U. S. 559, 571 (1965).

It is no mere abstraction to say that to permit a criminal conviction for reasonable resistance to an unconstitutional act will encourage police abuses. If the police cannot arrest an individual except upon probable cause, their power to harass is limited. But if the police can prosecute every time their unlawful acts are resisted, they are thereby encouraged to exercise their power arbitrarily. To understand the effect of such a rule, it is only necessary to consider how different the case of *Wright* v. *Georgia, supra,* might have been had it been illegal to resist the unlawful acts of the officers. The refusal of the Negro defendants to move from a place where they had a constitutional right to be could have been charged by the police as resistance to an unlawful arrest.

To permit resistance to an unlawful search or arrest to be made criminal also puts a dangerous weapon in the hands of

the authorities for control of persons they believe to be undesirable. For example, if the police wish to disperse a group of people distributing political leaflets in public, they need only tell them to move on, under threat of arrest. If they refuse, they can be arrested, whether constitutionally or not, and all physical refusals to move can be made valid basis for conviction.

If it is said that a rule allowing resistance will encourage disrespect for the law, the answer is that the people consent to obey the lawful orders of government partly because they know they can refuse the unlawful orders. To permit that refusal is essential to the sense of personal liberty.

"The Fourth Amendment, designed to protect the people against unlawful searches, was not enacted so that citizens should accept affronts in silence. Petitioner had a right to refuse to be searched, and it would flout the purpose of the Fourth Amendment to sustain his conviction for a refusal to submit to that search, brought about solely by the arbitrary acts of the police.[18]

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[18] The U. S. Court of Appeals for the Second Circuit has recently suggested that the vitality of the right to resist an unlawful arrest is "waning." *United States* v. *Heliczer*, 373 F. 2d 241, 246 n. 3 (1967). The Court's suggestion rested on two bases: The first was the Uniform Arrest Act; but compare *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Its second basis was Section 304(2)(a)(i) of the Model Penal Code adopted by the American Law Institute in 1958 which denies the right "to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful."

The debate over the issue within the A. L. I. was by no means as conclusive as the opinion in *Heliczer* would lead one to believe. For example:

"Mr. Boskey: I would either strike the standard or restore the view of what I judge is existing law, that a moderate amount of force but not an unreasonable amount may be used to resist clearly unlawful arrest." 1958 Proceedings, p. 246.

"Mr. Buchanan: I think it is rather shocking that you cannot use self-help against a fellow who wears a blue coat with

III.

Denial of petitioner's request to consult with his attorney, as guaranteed by the Sixth Amendment, prejudiced his rights during the police station confrontation and at trial.

This Court has made clear that the right to advice and aid of counsel "go[es] to the roots of our concepts of American criminal jurisprudence," *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Powell* v. *Alabama*, 287 U. S. 45

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brass buttons simply because he has a blue coat with brass buttons." Id. at 249.

"Mr. Knapp: I just read the opinion [in *People* v. *Cherry*, 307 N. Y. 308 (Ct. of App. 1954)] through, but I don't think this prospective change of the law would be likely to have changed the situation that happened at that particular fracas. The only change that would result from this prospective change in the law would be to compound the result by putting him in jail after the doctors had failed to cure him." Id. at 251.

"Judge Halpern: But apart from that, I think that the whole principle exalts the position of a peace officer in a way which is most unfortunate. It is true that the effort here is to persuade and educate the public not to use even moderate force which may sometimes lead to more serious force, but I think there are other values involved here. And certainly in a time when we in a democratic society are trying to protect democratic values and individual freedom, to suggest to the police state that the use of police force cures everything that they do—and this carries with it some such overtone—I don't like it at all.

I find it quite shocking that even moderate force of resistance is forbidden to the citizen against a man who says he is a peace officer. If may be that in New York City and in Philadelphia peace officers are much more law-abiding than they are in other cities, but we have had some very unfortunate experiences of automobile accidents in which a peace officer happens to be involved, not while he is technically on duty but nevertheless asserting his rights, and he proceeds to arrest everybody that is involved who might be in any way the

(1932); *Avery* v. *Alabama*, 308 U. S. 444 (1940); *McNeal* v. *Culver*, 365 U. S. 109 (1961); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *White* v. *Maryland*, 373 U. S. 59 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964). In particular, the Court said in *Escobedo* v. *Illinois*, 378 U. S. 478, 490-491 (1964):

> ". . . [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.' Gideon v. Wainwright . . . ."

There can be no question that petitioner here requested counsel at a point where the "focus [was] on the accused." *Escobedo* v. *Illinois*, *supra* at 492.

The police had informed petitioner that he "fit the description of an individual who committed a murder a week

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defendant in any claim by him or who might possibly assert any claim against him.

We have had some serious cases of abuse of power by police officers in my home city. A provision of this kind would, I think, in many respects be unfortunate. Let us consider the inconsistencies we get into.

Section 304(2)(a)(i) was adopted by a close vote of 59-46. 1958 Proceedings, p. 255.

or so previous" (B. 140-141). In the absence of papers establishing his identification, they had arrested petitioner, taken him to the station house and had placed him in the interrogation room where they had questioned him "about possible murder suspect" (R. 39).[19] After fifteen minutes of interrogation, he was booked. Thereafter, he was told to remove his jacket and, upon refusal after being denied the right to telephone his lawyer,[20] several officers forcibly removed it and handcuffed petitioner. This stream of incidents is similar to those held in *Escobedo* to require the presence of counsel when requested by the accused. 378 U. S. 479.[21]

Moreover, petitioner requested counsel as soon as interrogation began with respect to one offense and after arrest with respect to other offenses. The denial of counsel at this critical stage relieved petitioner of the duty to cooperate with the police once further cooperation imperiled rights which were subject to the protection of the law.[22]

Furthermore, this Court recently held in *United States* v. *Wade*, 35 U. S. L. Week 4597, 4599 (June 12, 1967), that "the

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[19] Immediately upon being brought to the interrogation room petitioner requested counsel (B. 142; R. 34, 36).

[20] This was a second denial.

[21] "In *Escobedo* v. *Illinois*, 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer." *United States* v. *Wade*, *supra* at 4599.

[22] *Miranda* v. *Arizona*, *supra*, decided after trial began in this case, makes this explicitly clear. While entirely dispositive of this case, *Miranda's* non-retroactivity keeps it from being operative here. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). However, since a critical stage of the proceedings had been reached in petitioner's case, and since he requested counsel, *Miranda* is unnecessary for reversal of the conviction.

accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate the accused's right to a fair trial." *Powell* v. *Alabama, supra* at 69, found that a defendant needs "the guiding hand of counsel at every step of the proceedings against him." [23] "Both *Miranda* and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) view counsel as an informational tool . . . ." [24]

> "[T]he principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *United States* v. *Wade, supra,* at 4599-4600.

Thus, it is not only when counsel may be helpful in protecting against self-incrimination, but when his "assistance is necessary to assure a meaningful defense," *United States* v. *Wade, supra* at 4599, or to prevent "substantial prejudice to defendant's rights . . . in a particular confrontation," *id.* at 4600, that a defendant must be allowed to consult with

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[23] *Escobedo* v. *Illinois, supra* at 492, further defines "proceedings" to encompass the right to counsel at any time the process shifts from "investigatory to accusatory."

[24] Counsel Searches: A Reappraisal after Miranda v. Arizona, 67 Col. L. R. 130, 154 (1967).

counsel when he requests. Counsel may be consulted whenever he can in fact be helpful in protecting a defendant's rights, and can be excluded only when "no issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U. S. at 766.[25]

How then could counsel have been helpful in protecting petitioner's rights? First, counsel could have established petitioner's identity by himself identifying him or by bringing petitioner's identification to the police station.[26] Since petitioner's arrest was unlawful *ab initio*, he had a right to be released immediately and counsel could have eliminated the need for any interrogation, booking or manhandling of a law abiding citizen who was within his rights in being on the streets.

Second, counsel could have advised petitioner that his arrest was illegal, that an illegal arrest may be resisted, and that he could not be held as a vagrant. Third, and perhaps most significantly, counsel could also have protested on these grounds to the police and possibly have persuaded them to avoid the incidents at the police station.

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[25] Louisiana law at the time of petitioner's arrest appears to have afforded an absolute right to consult counsel as well as friends. Art. 230 of the Louisiana Code of Criminal Procedure provides:

> The person arrested has, from the moment of his arrest, a right to procure and confer with counsel and to use the telephone or send a messenger for the purpose of communicating with his friends or with counsel.

[26] Petitioner had offered to produce identification if the officers would take him home but this was refused (B. 147-148). At the very least, then, the officers should have allowed him to call his attorney, who could have brought the necessary identification and secured petitioner's release. This would not have "prejudicially delayed" the identification. See *United States* v. *Wade*, *supra* at 4603.

As it was, a scuffle resulted when the police insisted upon forcibly removing petitioner's jacket after he had been denied the right to call his attorney. With counsel to help identify petitioner and to explain his rights to the police, the unnecessary could have been avoided altogether.[27]

Besides counsel's duty to make clear to the police the limits allowed by the law in questioning an accused, his presence would have aided in the preparation of petitioner's defense by providing him with information to safeguard his client's "right to a fair trial at which the witnesses against him might be meaningfully cross-examined." *United States* v. *Wade, supra* at 4598. The only witnesses to the charges against appellant were the policemen who arrested and processed him and his conviction rested upon their testimony alone.

Thus, for the reasons underlying the decisions in *Escobedo, Schmerber,* and *Wade,* the denial of counsel nullifies petitioner's convictions.

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[27] "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." *Schmerber* v. *California, supra* at 770-771. Although the intrusion in *Schmerber* was to the interior of the body, the same principles presumably apply to surfaces not customarily exposed or whose exposure under the circumstances offend common notions of privacy.

CONCLUSION

For all the reasons stated above, petitioner's convictions should be reversed.

Respectfully submitted,

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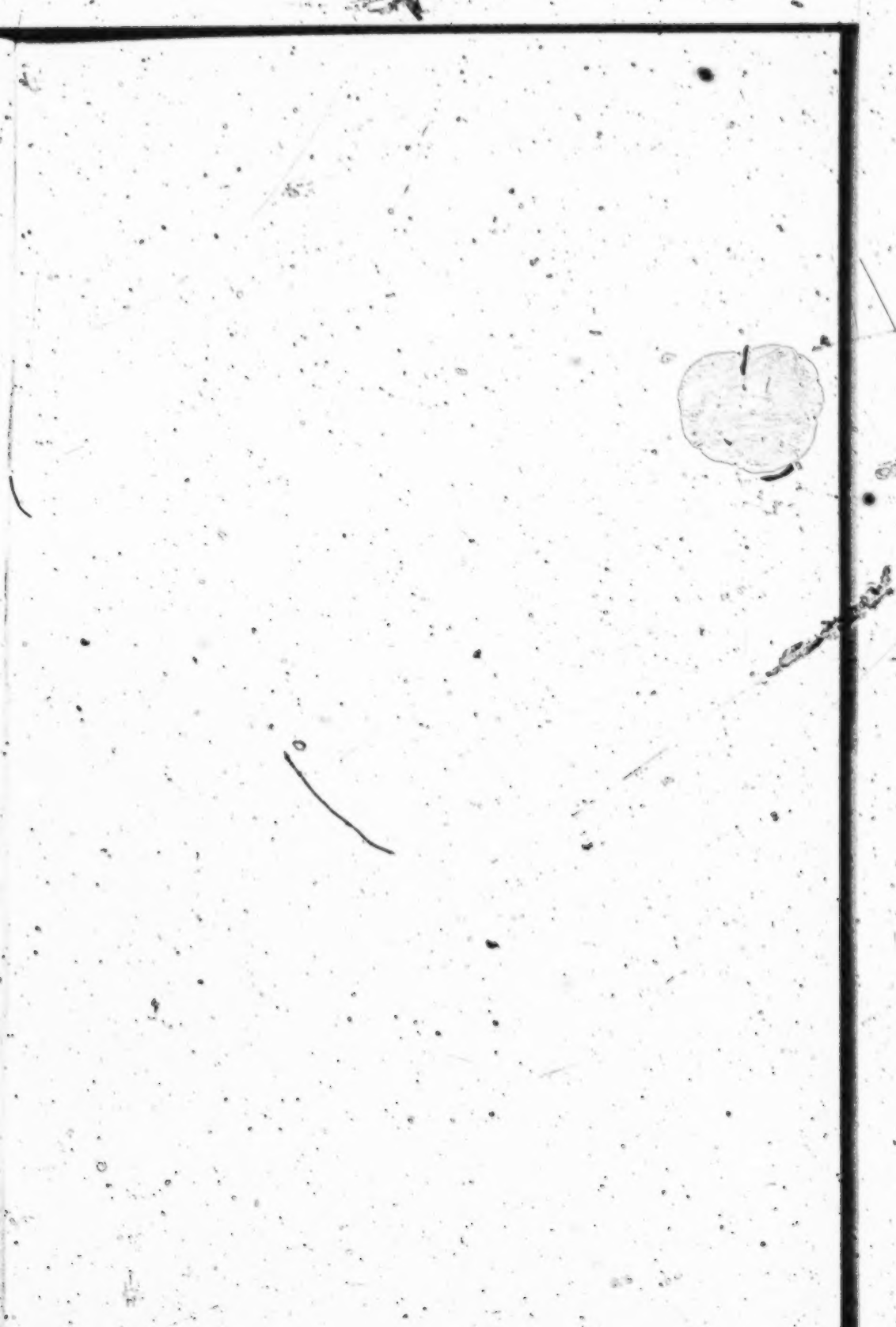

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 13

STEPHEN R. WAINWRIGHT,
Petitioner,

versus

CITY OF NEW ORLEANS,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW

Correct as stated in Brief for Petitioner.

JURISDICTION

Correct as stated in Brief for Petitioner.

QUESTIONS PRESENTED

The City of New Orleans submits that all five of the questions presented by Petitioner are neither fitting nor true because they are unfounded in fact.

The City further submits that it established, in its Response to Petitioner's Application for Writs, Petitioner's complete misrepresentation in the handling and reporting of facts. Examples:

Petitioner's Question IV alleges that Petitioner Wainwright refused, BECAUSE HE SUFFERS FROM AN UNSIGHTLY SKIN DISEASE, to remove his clothing. Wainwright mentioned NOTHING ABOUT ANY SKIN DISEASE to the investigating officers, and this point didn't appear until much later in the case. Wainwright's refusal to bare his left forearm was an act of arbitrary petulance in the assertion of "rights" he "knew" he had but which really did not exist and is a prime example of what can happen so long as the person being investigated has the power to determine, unilaterally, how the police should conduct themselves and whether they are doing their job correctly in the subjective view of the one under investigation. Wainwright wanted to supervise the very investigation he was the subject of.

Petitioner's Question V grossly misstates a fact when Wainwright says his resistance to "the inspection of his body" was "by merely folding his arms across his chest in trying to keep his clothing on." Three courts of law have already found that Wainwright did much more than that; he was convicted of butting two police officers around from wall to wall; the testimony of those he assaulted and butted went uncontroverted in the court room, and the City repeats the request made in its Response brief that this Court weigh the facts as related by Wainwright and his forces IN BRIEF against those facts as they appear in the varied transcripts of the court proceedings when witnesses testified under oath before Wainwright and his attorneys.

The City makes part and parcel of this "Brief For Respondents" its 30-page "Response In Opposition To the Issuance of A Writ of Certiorari to the Supreme Court of Louisiana," filed into this record in December, 1966, including, especially, the 3-page Index which precedes it,

plus also the five Appendices, Appendix A through Appendix E.

STATUTES INVOLVED

Sections 42-25, Disturbing the Public Peace, and 42-85 (7), Vagrancy by Loitering, of the Code of the City of New Orleans, are correctly reported in the Brief of Petitioners.

But conspicuous by its absence from Petitioner's Brief are municipal ordinances setting forth the law on RESISTING AN OFFICER. Inasmuch as Wainwright was never convicted of Vagrancy, the validity of that ordinance is not properly before this court unless the Wainwright forces insist on testing the validity of the arrests.

But if that is the basis for an examination here of the Vagrancy ordinance, then the City is at a loss to understand why the Wainwright forces ignore a testing of the RESISTING AN OFFICER ordinance, because Wainwright was originally arrested on BOTH charges and the Brief for Petitioner concedes, at Page 6, the officers were "unable to say whether petitioner tried to walk away 'before or after he was told he was under arrest' (B. 177)"

The charge is Resisting An Officer and the ordinance states that this means "an individual acting in his official capacity AND AUTHORIZED BY LAW TO MAKE A LAWFUL ARREST, etc." Unfortunately, this law and others like it have all too long been popularly branded with the name "Resisting Arrest," and have been all too often interpreted to be limited to "Resisting Arrest" when there is no earthly reason to suppose that it would be the legislative will (or, for that matter, the judicial or executive will, either) to limit Resisting an Officer ONLY to those situations when an officer empowered to make an arrest

is making an arrest and ruling out any situation when an officer who has the power to make an arrest is performing other phases of police duties such as finger-printing, photographing, investigating, gathering evidence, etc.

It is the City's position that neither the Vagrancy ordinance nor the Resisting An Officer ordinance is properly before this court for its consideration, but the City submits, with respect, that if either can correctly be the subject of review by this Court, then so can the other.

So here are copies of the New Orleans municipal ordinances and the Louisiana Statute on RESISTING AN OFFICER:

> Section 49.1. **What constitutes resisting an officer.**
>
> Resisting an officer is the intentional opposition, resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property or serving process is acting in his official capacity. (C.C.S., Ord. No. 18,142, § 1)
>
> Section 49.2. **Resistance unlawful.**
>
> It shall be unlawful for any person, by word or action, to resist an officer or to incite, induce, suggest or otherwise persuade or attempt to persuade any person to resist an officer. (C.C.S., Ord. No. 18,142, § 2)
>
> Article 108, Title 14, Revised Statutes of Louisiana. **Resisting an officer.**
>
> Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of prop-

erty, or to serve any lawful process or court order, when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

Whoever commits the crime of resisting an officer shall be fined not more than three hundred dollars, or imprisoned for not more than six months, or both.

It is respectfully suggested that if "Resisting An Officer" is to be examined, that this court hold, especially in these troubled times of demonstrations, riots, and related disturbances, that Resisting An Officer means just that, the resisting of a duly qualified officer of the law in the performance of any official duty or act, and is not limited to only an act of arrest. The City requests this court to rule that state and local officers of the law, as well as federal officers, can, indeed, be resisted while performing duties prior to an arrest, as was held in *Amaya vs. United States*, C.A. Cal. 1957, 247 F. 2d 947, Certiorari denied 355 U.S. 916, 78 S. Ct. 346, 2 L. Ed. 2d 276, where an investigation was being made as to a violation of federal law.

Amaya, and U.S.C.A., Title 18, Section 111, and U.S. C.A., Title 18, Section 1114 clearly establish this to be the law at the federal level and concerning qualified federal officers.

Regarding the City's use of the Vagrancy ordinance as a holding charge, this is simply not true; it is simply not done in New Orleans, and it was not done in this Wainwright case. Mr. Justice Douglas, in his "Vagrancy and Arrest on Suspicion," was, we believe, condemning the practice of using any lesser charge as the basis for holding a person for investigation of a greater charge, a felony. New Orleans did not do this in the Stephen R.

Wainwright case, but if it is to be argued that vagrancy was employed as a holding charge here, then it can certainly be argued that so, too, was "Resisting An Officer" similarly employed, and an examination of the one, Vagrancy, certainly justifies an examination of the other, Resisting An Officer.

Further, there is no conflict in charging a person with both vagrancy and a felony if the vagrancy charge stands on its own feet and is not employed as merely a holding charge. There is no conflict because vagrants have been known to commit murder and murderers have been known to be vagrants, and if a vagrant or loiterer or drifter or idler happens to commit murder or armed robbery or some other felony, the murder, armed robbery or other felony makes him no less a vagrant, loiterer, drifter or idler. The City tried Wainwright for Vagrancy; and even though it was clearly established on the day of arrest that Wainwright was not the murder suspect sought, the City persisted in its Vagrancy charge and took him to Court, to trial as a Vagrant Loiterer.

STATEMENT OF THE CASE

The City's appreciation of the Statement of the Case is precisely that of Orleans Parish Criminal District Court Judge Thomas M. Brahney as stated in his Judgment, which is printed in full at Pages 41-47 of Stephen R. Wainwright's "Petition For A Writ of Certiorari to the Supreme Court of Louisiana."

A mere reading of that Judgment will accommodate the Respondent in several ways: It will present to this court the City's Statement of the Case as well as citation of authorities with which the City completely agrees, embraces in full as her own authorities, and which the City

now respectfully offers, at this point, as part and parcel of her own "Brief For Respondent."

THE ARGUMENT

For the most part, cases cited by the Wainwright forces fall into three categories * * * 4th, 5th, and 6th Amendment cases * * * **NONE** of which apply to this Wainwright vs. New Orleans matter. The breakdown:

SIXTH AMENDMENT

Gideon vs. Wainwright * * * Right to counsel **at trial** * * * no problem here; Wainwright was **ALWAYS** attended by counsel at all trials. So *Gideon vs. Wainwright* not applicable here.

FIFTH and SIXTH AMENDMENTS

The *Escobedo* and *Miranda* cases * * * Ruled out self-incriminatory statements (5th Amendment) if not first told of right to counsel (6th Amendment), right to silence, etc. * * * no problem here; Wainwright made no confessions or admissions so, of course, none are in the record. There are **NO CONFESSIONS** to **rule out** of evidence. Ergo, *Escobedo* and *Miranda* not applicable here.

FOURTH AMENDMENT

Most of the other cases cited by the Wainwright forces are 4th Amendment cases that deal with the suppression of evidence illegally seized, **but** there **IS NO EVIDENCE** in this **case** to suppress. No physical evidence was ever seized; the fact is, no physical evidence was ever sought. The only thing ever sought of Wainwright was **exculpatory** in nature, i.e., a glimpse at Wainwright's left forearm to see if he had a tattoo "Born to Raise Hell" on that left arm. Had the left forearm been bare of a tattoo, the "evidence" sought, i.e., a glimpse at that arm would have **exculpated** Wainwright. A tattoo on his arm could never have been incriminating; murders aren't done with tattoos, so the tat-

too could not be physical evidence of any crime, and the presence of a tattoo could not have incriminated Wainwright of anything, because other people have tattoos on their arms and everybody with tattoos on their left arm are not murderers.

WHAT ELSE IS LEFT?

Nothing, says the City of New Orleans.

The arrest and search, says the American Civil Liberties Union.

To which the City answers:

The ACLU's position appears to be: The original arrests being unlawful, any evidence seized in searches made incidental to those unlawful arrests must be suppressed. (But there is **NO EVIDENCE** to suppress, the record shows.)

The City's position:

(1) There was **NEVER** any evidence sought, seized or introduced in this case, so there is **NOTHING** to rule out of evidence.

(2) There was **NEVER** any search made in this case, neither at the scene of the arrest **NOR** at the police station, so the question should go begging as to whether a search was made incidental to an arrest.

First of all, there was NO SEARCH of Wainwright made at any time. When, at the Bourbon Street scene, Wainwright was ASKED (NEVER "Ordered," as Wainwright falsifies it) to remove his jacket, and he refused, **NOTHING HAPPENED.** He was not, then and there, arrested. He was questioned for another three minutes or more, during which time he THRICE tried to walk away from the police who were only doing their duty (and doing

it properly, patiently and well) of investigating murder in the metropolis which leads the nation with the highest murder rate in the United States.

The police testified in court that it is sound, standard, routine police procedure to have everyone remove their belts, ties, jackets — for the protection of the arrestees themselves and of other arrestees — because files, saws, certain types of weapons may be secreted within the jackets of outer garments. They testified that Wainwright was ordered to remove his jacket (like everyone else booked that night) ONLY AFTER EVERY OTHER ENTREATY and APPEAL TO REASON had FAILED. (See, especially, the testimony of Lt. Francis Martello, Pages 53 and 54 of Appendix B, Response brief.)

The police did inspect Wainwright's left forearm (the outer skin for marks of identification or lack of identification, if you will) after the jacket was removed. The jacket was removed not primarily to effect a search but to have Wainwright — who had been told from the beginning that he had a right to use the phone to call his attorney or anyone else he wished after he was booked, there being no point in using a precinct phone to tell someone, if you have not been booked, that you have been cleared—submit to the usual procedure of removing all ties, belts and jackets before being booked. Everyone else booked that night removed their belts, ties and jackets before being booked; other than satisfying a completely subjective, childish, petulant whim, why not Wainwright?

Just what constitutional guarantee was Wainwright asked to surrender?

The City submits that a mere reading of the 37-page Appendix B of her Response Brief, which Appendix B contains the entire transcript of the testimony in the Assault

cases of which Wainwright stands convicted, will clearly establish that it was Wainwright who conducted himself in an arbitrary, capricious, suspicious and furtive manner from the outset of this case and that the police were courteous, considerate, patient, anything but arbitrary, and literally pleaded with Wainwright to cooperate in the investigation of a murder in the community. They told him they did not want to arrest him, that a mere baring of his left forearm showing no tattoo would terminate the matter right there and Wainwright could go on about his business.

The police told Wainwright why he was being investigated, showed him the composite drawing of the wanted subject, explained that he fit that composite, and tried every way possible to gain Wainwright's cooperation.

There having been no search, there is no point in examining the lawfulness or unlawfulness of the arrests incidental to which the search was never made.

But if it is considered that there was a search, then that search was only for identifying marks or lack thereof, and Orleans Parish Criminal District Court Judge Thomas M. Brahney very adequately touched upon that subject in his appellate decision (which, significantly enough, was favorable to Petitioner inasmuch as it reversed one of three charges —resisting an officer — on which Wainwright had been convicted in Municipal Court). See Judgment, pages 41-47 of Stephen R. Wainwright's "Petition For A Writ of Certiorari to the Supreme Court of Louisiana," especially:

Page 42, *People v. Estrialgo*, 37 Misc. (2) 264, 233 N.Y.S. 2d 558, and:

Pages 44-45, the entire paragraph quoted from 21

Am. Jur. 2d 368, especially but not exclusively the language, "Thus, a suspect has been required to * * * submit to a physical examination of his body * * * ."

Throughout the various and varied Wainwright briefs there seems to be agreement that the quest was for the presence or absence of identifying marks, so we do not appear to be at issue on this point.

But, at the VERY WORST, if there was a search, it was — at the VERY EXTREME — but a strip search, an examination of the outer skin of Wainwright's person, of his left forearm, and:

STRIP SEARCHES ARE NOT UNLAWFUL

See: *Henderson vs. U. S.* 7/7/67, reported in 1 Criminal Law Reporter, at page 2275. Argument by the City of New Orleans:

The City has steadfastly maintained, throughout the history of this case, that there was **no search** at all ever made of this defendant, Stephen R. Wainwright; that at the initial Bourbon Street scene he was merely asked, requested, (**NOT ORDERED**, as Wainwright contends) to remove his jacket so the police could examine his left forearm for **exculpatory** evidence which would have ended the matter right there. But if there was any search, it was at worst a **strip search**, and a strip search is not unlawful.

"I think we will agree," wrote Ninth Circuit Judge Chambers in *Henderson v. U. S.*, *supra*, "that Schmerber (*Schmerber v. California*, 384 U.S. 757, 1966) deals specifically with an invasion, rather than an examination of one's body."

"Both Schmerber, generally, and the 'clear indication'

test, specifically, are concerned with searches involving intrusions of the body, not with strip searches.

"I find nothing in Schmerber," Judge Chambers wrote, "to compel reversal of *Witt v. United States*, 9 Cir., 287 F. 2d 389, where this court held that strip search was not unlawful."

CONCLUSIONS

1. The City of New Orleans should be maintained in its conviction of Stephen R. Wainwright for the simple reason that Wainwright was convicted of assaulting two officers of the New Orleans Police Department, and evidence in support of that conviction has gone uncontroverted. There are no other matters properly before this court.

2. The convictions on assaulting two police officers depend in no wise on any confessions or admissions by Wainwright; they depend in no wise on any physical evidence because none was sought, seized nor introduced in the case.

3. There is **NO EVIDENCE** to suppress in this case, consequently there is no basis for examining arrests incidental to which no search was ever made.

4. But if what happened in this Stephen R. Wainwright case IS considered a search, then it is a lawful search which Wainwright should be faulted for resisting and which the police should not be penalized for making.

The majority in *Schmerber vs. California* have held that evidence seized in an actual intrusion of the body is admissible, so if it be the law of the land that a person's blood vessels can be punctured to obtain incriminatory evidence it can be no less the law of the land to allow a

cursory examination of the outer skin of one's body for the absence or presence of mere marks of identification, as in the instant Stephen R. Wainwright case.

5. There is nothing in the record (as sharply contrasted to contrary allegations in Wainwright's brief) that would justify reversing his convictions of assaulting two police officers who were doing their duty, under orders, and doing it patiently and well.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the above and foregoing Brief for Respondent was this date sent to counsel for the Petitioner by United States Mail, postage prepaid, addressed to them at their offices as follows:

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New Orleans, La.

_____, 1967.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1967.

Stephen R. Wainwright,
Petitioner,
v.
City of New Orleans, Louisiana.

On Writ of Certiorari to the Supreme Court of Louisiana.

[June 17, 1968.]

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1967.

Stephen R. Wainwright, Petitioner, v. City of New Orleans, Louisiana. } On Writ of Certiorari to the Supreme Court of Louisiana.

[June 17, 1968.]

Mr. Justice Harlan, concurring.

I wish to state in a few words my reasons for joining in the dismissal of this writ as improvidently granted. For reasons stated in the dissenting opinion of my Brother Douglas I agree that the dispositive federal issue in this case is whether the petitioner used an unreasonable amount of force in resisting what on this record must be regarded as an illegal attempt by the police to search his person. I find this record too opaque to permit any satisfactory adjudication of that question. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1967.

Stephen R. Wainwright, Petitioner, v. City of New Orleans, Louisiana. } On Writ of Certiorari to the Supreme Court of Louisiana.

[June 17, 1968.]

Mr. Justice Fortas, with whom Mr. Justice Marshall joins, concurring.

With profound deference to the opinions of my Brethren who have filed opinions in this case, I am impelled to add this note. Upon oral argument and further study after the writ was granted, it became apparent that the facts necessary for evaluation of the dispositive constitutional issues in this case are not adequately presented by the record before us. It is also entirely clear that they cannot now be developed on remand with any verisimilitude.

The central issue that this case appeared to present for decision when certiorari was granted is of great importance. It is whether the police, seeing a pedestrian who fits the description of a person suspected of murder, may accost the pedestrian and stop him; and when and to what extent is the accosted person justified in refusing to cooperate with efforts of the police to establish that he is or is not the person whom they seek.

I am not prepared to say that, regardless of the presence or absence of adequate cause for police action, the arrest or the attempt by the officers to search is unlawful, as my Brother Harlan's opinion suggests, where the accosted person produces no identification, attempts three times to walk away, and refuses to dispel any doubt by showing that his forearm is not tattooed. I should

want to know whether, in fact, there was constitutionally adequate cause for the police to suspect that the pedestrian was the man sought for murder.

If the Court should, on an adequate record, determine that the police action in stopping and arresting petitioner violated his constitutional rights, there would remain, among other issues the question of culpability for the scuffle that ensued. My Brethren who have written in this case seem agreed that the record is too sketchy to permit decision of this issue.

The Court has properly dismissed the writ as improvidently granted. I respectfully submit that the Court is correct to leave the matter there. I should regret any inference that might be derived from the opinions of my Brethren that this Court would or should hold that the police may not arrest and seek by reasonable means to identify a pedestrian whom, for adequate cause, they believe to be a suspect in a murder case. I do not believe that this Court would or should, without careful analysis, endorse the right of a pedestrian, accosted by the police because he fits the description of a person wanted for murder, to resist the officers so vigorously that they are "bounced from wall to wall physically" or to react "like a football player going through a line." Our jurisprudence teaches that we should decide issues on the basis of facts of record. This is especially important in the difficult, dangerous, and subtle field where the essential office of the policeman impinges upon the basic freedom of the citizen.

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1967.

Stephen R. Wainwright, Petitioner, v. City of New Orleans, Louisiana. } On Writ of Certiorari to the Supreme Court of Louisiana.

[June 17, 1968.]

Mr. Chief Justice Warren, dissenting.

About midnight on October 12, 1964, petitioner, a student at Tulane University Law School, left his French Quarter apartment in New Orleans to get something to eat. Approximately four blocks from his apartment, two officers of the New Orleans Police Department who had observed petitioner as they cruised by in their car stopped him, because in their opinion he fitted the description of a man suspected of murder, That suspect had tattooed on his left forearm the words "born to raise hell." Petitioner told the officers he had identification at home but not on his person. He gave them his name and address, and informed them he was a law student and was on his way to get something to eat. The officers told petitioner they thought he resembled a murder suspect, and asked him to remove his jacket so they could check his forearm for the tattoo. Petitioner refused, saying he would not allow himself "to be molested by a bunch of cops here on the street," and he "didn't want to be humiliated by the police." Petitioner was then suffering from a skin ailment which he apparently regarded as unsightly and which would have been exposed had he removed his jacket, though he did not communicate this to the police. The police arrested him on a charge of vagrancy by loitering and frisked him.

During this incident petitioner attempted three times peacefully to walk away from the officers. The first two

attempts came after petitioner had given what he regarded as sufficient identification. The third, although the officers were not certain about this, apparently occurred after petitioner was informed he was under arrest. Evidently on the basis of this last attempt, petitioner was subsequently charged with resisting an officer. Petitioner used no force in any of his attempts to walk away and each time stopped when so directed by the police.

After petitioner was inside the police car he called the officers "stupid cops," whereupon they told him he would also be charged with reviling the police. When the car arrived at the police station, petitioner offered to produce identification if they would take him home, but this offer was rejected. In the stationhouse, petitioner was interrogated for about 10 minutes concerning a "possible murder suspect." Thereafter, he was booked for vagrancy by loitering, resisting an officer, and reviling the police.

An officer then told petitioner to remove his jacket. Petitioner refused, folding his arms and crouching in a corner. Two officers, according to one of them, then "got hold of each of his arms . . . [and] tried to pry his arms apart, and . . . were bounced from wall to wall and bench to bench and back again." Petitioner did not strike at or kick the officers, but rather, according to one officer; "danc[ed] from wall to wall . . . trying to keep us from getting his arms." According to another, the officers were jostled only by "the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers." The officers sustained no bruises, marks, or torn clothing as a result of this incident, and succeeded in removing petitioner's jacket and discovering he had no tattoo.

Petitioner's trial for the three charges based on the episode in the street—vagrancy by loitering, resisting an

officer and reviling the police—commenced on December 4, 1964. After partial testimony the trial was adjourned, and not resumed until May 7, 1965, when the court heard further partial testimony and adjourned over petitioner's objection. The trial was again resumed on May 14, and at the close of the State's case on that day petitioner's motion for dismissal was taken under advisement, and three new charges based on events inside the police station were lodged against him. Respondent, before this Court, characterizes the original charges which were prosecuted against petitioner intermittently over a six-month period as "long-abandoned." Why the police waited six months before bringing charges based on events occuring within the police station is nowhere explained.

These new charges consisted of two counts of disturbing the peace by assaulting police officers, and one count of resisting an officer. Petitioner was convicted in the Municipal Court on all three counts. On appeal to the Criminal District Court, petitioner argued that his arrest and subsequent search were unlawful, and therefore he had a right to resist the search. He claimed that "[t]he legality of the arrest must be shown in order to find the defendant guilty of any crime in resisting it." He also argued that the evidence showed only that he tried to hold his jacket on, and that resistance of this type does not constitute the crime of assault. The court reversed the conviction for resisting an officer on the ground that the resistance must occur while the officer is making an arrest to constitute a crime under the ordinance. However, the court found the arrest was lawful, and since "[t]he defendant was in police custody pursuant to a legal arrest . . . the officers had the right and obligation to search the defendant . . . ." It held that "an individual in lawful police custody" cannot resist the actions

of the police in doing their duty, and therefore affirmed the convictions for assault.[1]

Petitioner sought writs of certiorari, prohibition, and mandamus in the Louisiana Supreme Court, again arguing that because the arrest and search were unlawful he had a right to resist, and also that the "evidence merely shows that the defendant acted in self-defense and resisted the removal of his clothing." The court denied his application, holding: "The ruling of the Criminal District Court for the Parish of Orleans is correct."

Petitioner argues before this Court that his arrest and subsequent search in the station house were unlawful and that he had a right under the Fourth Amendment reasonably to resist the unlawful search. In my view, there can be no doubt on this record that the arrest and subsequent search of petitioner were illegal. I believe that the illegality of the search alone requires reversal of the judgment below, which rejected possibly meritorious state-law claims on the erroneous premise that the search was lawful. Therefore, in accordance with this Court's well-established practice "not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record," *Garner* v. *Louisiana*, 368 U. S. 157, 163 (1961), I would reverse and remand this case without reaching the question whether petitioner had, and acted within, a Fourth Amendment right to resist.

The officers had neither a warrant nor probable cause to arrest petitioner for vagrancy by loitering.[2] The loiter-

[1] The ordinance under which petitioner was convicted provides: "No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another." § 42-24 Code of the City of New Orleans, Louisiana.

[2] The reviling the police charge arose from an incident subsequent to the unlawful arrest. While it is not entirely clear from the testimony whether the charge of resisting an officer was based on peti-

ing charge was based on the inconsequential circumstance that petitioner had been standing still for 5 to 10 seconds before the police approached him. That petitioner had no identification papers on his person and had very little funds obviously add nothing which could constitutionally make his conduct criminal. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960).

My Brother FORTAS suggests that we cannot determine whether petitioner's arrest was unlawful because the record does not reveal whether the officers had probable cause to arrest him for murder. I agree that the record does not permit a determination of whether the officers could lawfully have arrested petitioner for murder. With due respect, however, I suggest that this is an irrelevant inadequacy in the record. The record does establish that

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tioner's pre- or post-arrest attempt to walk away, the decision of the Criminal District Court reversing petitioner's conviction for resisting an officer based on events inside the police station makes clear that to constitute a crime under the relevant New Orleans ordinance the resistance must occur in the process of an arrest. Therefore, petitioner's pre-arrest attempts to walk away are irrelevant. His post-arrest attempt, just as his post-arrest alleged reviling of the police, cannot justify the initial arrest for vagrancy. Cf. *United States* v. *di Re*, 332 U. S. 581, 595 (1948); *Byars* v. *United States*, 273 U. S. 28, 29 (1927). In any event, it is evident that these two charges are as baseless as the vagrancy charge. A peaceful attempt to walk away from a police officer, where the accused has identified himself, has committed no crime in the presence of the officer, and stops as soon as the officer directs him to cannot be regarded as the crime of resisting an officer, and, it is fairly clear, would not be so regarded in Louisiana. See *State* v. *Dunnington*, 157 La. 369, 102 So. 478 (1924); *State* v. *Scott*, 123 La. 1086, 49 So. 715 (1909). And with due regard for the sensitivity of police officers, it is simply inconceivable that it can be made criminal to speak the words "stupid cop," without more, in the privacy of a police car. It seems likely that the abandonment of the prosecution on these charges after the State had presented its case indicates that the prosecuting officials were well aware of the groundlessness of all three charges.

petitioner was not arrested for murder. The record does establish that the police interrogated petitioner for about 10 minutes concerning the murder before it was decided that he would not be booked for murder. The record does establish that petitioner was booked only for vagrancy by loitering, resisting an officer and reviling the police.

"Booking" is an administrative record of an arrest. When a defendant is booked, an entry is made on the police "arrest book" indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense for which he was arrested, and other information.[3] In Louisiana, as in most jurisdictions,[4] the police are required by law to book a suspect in this manner. 1 La. Code Crim. Proc., Art. 228.[5] And as the Official Comment upon the pertinent Louisiana statute recognizes, this official and permanent arrest record "provides a valuable protection against secret arrests and improper police tactics." 1 La. Code Crim. Proc., p. 131. I see no more justification for per-

[3] See LaFave, Arrest: The Decision to Take a Suspect into Custody, at 379–382 (1965). Cf. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 8 (1967).

[4] See, *e. g.*, New York City Charter and Administrative Code § 435–12.0 (1963); District of Columbia Code § 4–134 (1967).

[5] 1 La. Code Crim. Proc., Art. 228, provides that: "It is the duty of every peace officer making an arrest, or having an arrested person in his custody, promptly to conduct the person arrested to the nearest jail or police station and *cause him to be booked*. A person is booked by an entry, in a book kept for that purpose, showing his name and address, *the offense charged against him*, by whom he was arrested, a list of any property taken from him, and the date and time of booking. Every jail and police station shall keep a book for the listing of the above information as to each prisoner received. The book shall always be open for public inspection. The person booked shall be imprisoned unless he is released on bail." (Emphasis added.)

mitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the "low-visibility" sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second guessing of lawyers and judges. Nor would holding the police to official records frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder.[6] If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge to verify their suspicions.[7]

It is perfectly plain, however, that the police in this case were, to say the least, not confident that petitioner was the murder suspect, and that the vagrancy charge here was used as a pretext for holding petitioner for further questioning concerning the murder. This technique, using a minor and imaginary charge to hold an individual, in my judgment deserves unqualified con-

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[6] Of course, I do not mean to suggest that a defendant arrested and booked for one crime cannot later be charged with other crimes. The point is simply that when a controversy arises over the legality of the arrest, the police should be held to the booked offense.

[7] For example, one officer might have followed petitioner while the other secured more detailed information about the murder suspect from headquarters, and/or checked petitioner's identification by looking at a phonebook or going to the address he gave them. They might also have checked with someone connected with petitioner's law school. Another alternative would have been to suggest that petitioner voluntarily return to his apartment, which the officers knew was only four blocks away from the scene of the arrest, to secure identification—an offer which petitioner made upon arrival at the police station and the officers rejected.

demnation.[8] It is a technique which makes personal liberty and dignity contingent upon the whims of a police officer, and can serve only to engender fear, resentment, and disrespect of the police in the populace which they serve.

Since the arrest was unlawful, the subsequent search of petitioner in the station house was also unlawful. See *Henry* v. *United States*, 361 U. S. 98 (1959); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *Johnson* v. *United States*, 333 U. S. 10 (1948); *United States* v. *di Re*, 332 U. S. 581 (1948). Because the opinion of the court below was predicated upon the asumption that this search was lawful, I think that the judgment below must be reversed. If the Louisiana courts had reached the correct conclusion that the police officers had no authority to search petitioner, they might well have concluded that petitioner was within his rights under local law in resisting this unlawful search.

There are two relevant and related legal principles which the Louisiana courts might have drawn upon in considering this question. The first is the principle of self-defense, which was inferentially raised by petitioner in his appeal to the Criminal District Court and expressly noted in his application to the Louisiana Supreme Court. The idea that an individual cannot be held criminally responsible for acts done in reasonable defense of his person is deeply rooted in our jurisprudence. Self-defense has long been recognized in Louisiana,[9] and is

[8] Cf. *United States* v. *Carignan*, 342 U. S. 36, 46 (1951); *Culombe* v. *Connecticut*, 367 U. S. 568, 631–632 (1961). Respondent, the City of New Orleans, urges that it abandoned the practice of arresting for vagrancy pending investigation of other offenses in 1958. If this is so, the city is deserving of commendation. Irrespective of the general policy of the city, however, the instant case clearly demonstrates that the practice continues.

[9] *State* v. *Chandler*, 5 La. Ann. 489 (1850); *State* v. *Scossoni*, 48 La. Ann. 1464, 21 So. 32 (1896); *State* v. *Baptiste*, 105 La. 661,

now provided for by several sections of the State Criminal Code, one of which states:

> "The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person . . . ; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense . . . ." [10]

The Supreme Court of Louisiana has recently intimated that this defense is available to a defendant charged with aggravated assault upon a police officer, if the asserted assault was committed after the officer attempted unlawfully to arrest the defendant.[11] Whether such a defense is available against the disturbing the peace by assault charge upon which petitioner was convicted and whether the record in the instant case establishes such a defense are questions of Louisiana law.

The second principle which the state courts might regard as dispositive in this case was announced by the Louisiana Supreme Court in *City of Monroe* v. *Ducas*, 203 La. 971, 14 So. 2d 781 (1943):

> "The right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any

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30 So. 147 (1901); *State* v. *Bolden*, 107 La. 116, 31 So. 393 (1902); *State* v. *Short*, 120 La. 187, 45 So. 98 (1907); *State* v. *Robinson*, 143 La. 543, 78 So. 933 (1918); *State* v. *Van Duff*, 146 La. 713, 84 So. 29 (1920). See generally, Comment, Self-Defense in Louisiana—The Criminal Law and the Tort Law Compared, 16 Tulane L. Rev. 609 (1942).

[10] La. Rev. Stat. § 14–19. This statute has been broadly interpreted by the Louisiana Supreme Court. *State* v. *Rowland*, 246 La. 730, 167 So. 2d 346 (1964). See also La. Rev. Stat. §§ 14–18, 14–20, 14–21, 14–22.

[11] *State* v. *Tedeton*, 243 La. 1031, 150 So. 2d 4 (1963). However, the assault in the *Tedeton* case was found to have been committed *before* any attempted arrest.

> unlawful interference with it may be resisted. Every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary." [12]

Petitioner vigorously argued in the state courts that he had a right to resist the station house search which he contended was unlawful, but the state courts never came to grips with this issue because they held he was then in "lawful police custody" pursuant to "a legal arrest." By virtue of the *City of Monroe* case, *supra*, it appears with unmistakable clarity that an individual in Louisiana has a right under state law reasonably to resist an unlawful arrest. Whether this state right encompasses the right to resist an unlawful search and whether the amount of resistance here was reasonable are questions of state law.

Since the state courts' appraisal of these crucial questions of state law was foreordained by their erroneous ruling that the search of petitioner was lawful, they should be permitted the opportunity to reconsider these questions. Accordingly, I would reverse the judgment below and remand this case to the Louisiana Supreme Court for further proceedings consistent with this opinion. Because I believe the question whether the police can arrest someone on a trumped-up minor charge pending investigation of other crimes warrants this Court's condemnation, and because, unlike my Brethren, I do not find this record too opaque for what I consider a proper disposition, I respectfully dissent from the dismissal of the writ of certiorari as improvidently granted.

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[12] *City of Monroe* v. *Ducas*, 203 La. 971, 979, 14 So. 2d 781, 784 (1943). See also *Lyons* v. *Carroll*, 107 La. 471, 31 So. 2d 760 (1902).

SUPREME COURT OF THE UNITED STATES

No. 13.—October Term, 1967.

Stephen R. Wainwright, Petitioner, v. City of New Orleans, Louisiana. } On Writ of Certiorari to the Supreme Court of Louisiana.

[June 17, 1968.]

Mr. Justice Douglas, dissenting.

If this case is to be decided by the traditional Fourth Amendment standards applicable prior to *Terry* v. *Ohio*, *ante*, —, the question is whether a person who is unconstitutionally arrested must submit to a search of his person, or whether he may offer at least token resistance.

Police officers while cruising late one night saw petitioner standing on a street corner and concluded that he fitted the general description of a murder suspect. They accosted him and asked him to identify himself. He had no identification on his person, only at home. He gave the officers his name and address, and informed them that he was a law student. The officers told him he was being questioned because he fitted the description of a murder suspect who had on his left forearm a tattoo which read, "born to raise hell." The officers asked him to remove the coat he was wearing so they could check his forearm, but he refused. He was then "seized" and taken to the police station, where he was asked to remove his jacket. He refused, folding his arms and crouching in a corner. The officers then attempted to take his jacket off, each pulling on one arm. There was no battle or fracas of any consequence. Petitioner, however, did resist this attempt by moving about and by pushing one officer to one side and then pushing the other officer to the other side. But so far as the record shows no more violence happened than that produced by the

combined efforts of petitioner and the officers which caused the officers to be butted around the room. He did not strike at the officers, nor kick them, and none of them had any marks or bruises or torn clothing.[1]

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[1] I do not, as my Brothers HARLAN and FORTAS suggest, consider the record too sketchy for determining the degree of force employed by petitioner in resisting the officers. The record discloses that no violence and little force were used by petitioner.

Lieutenant Martello, the officer apparently in charge of the station to which petitioner was taken, testified as follows:

"Mr. Wainwright refused to take his jacket off . . . so I instructed him I would have the jacket removed by the doorman.

"He again refused. He walked into a corner, grabbed his jacket by his hands, folding his arms, and he said, 'If you want this jacket off take it off.'

. . . . .

"Officer O'Rourke and Officer Gilford asked him to take the jacket off and he didn't respond, so they physically took the jacket off him. He done everything in his power to keep them from removing the jacket. In this operation the officers were bounced from wall to wall physically, and with the assistance of a couple of other police officers they put handcuffs on one of his arms, and they removed his jacket."

On cross-examination, Martello elaborated:

"Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it?

"A. He tried to keep it on by holding it.

"Q. How?

"A. By folding his arms (demonstrates).

"Q. He didn't do anything else?

"A. Not to my knowledge.

"Q. If Officer O'Rourke and Officer Gilford got thrown around the room, it was through their own effort?

"A. No, it was the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

"Q. He didn't do anything but try to hold the jacket on?

[*Footnote 1 continued on p. 3*]

He was booked on three charges—vagrancy, resisting an officer, and reviling the police.

At the end of the State's case petitioner moved for dismissal of the charges. That ruling was held under advisement and petitioner was at once arraigned on three new charges, one of resisting an officer and two for disturbing the peace by assaulting an officer. The trial on this second case was had and petitioner fined $25 on each charge or given 30 days in jail on each charge, the sentences being suspended. On appeal the conviction of resisting an officer was reversed, but his conviction on two charges of disturbing the peace was affirmed by the Criminal District Court and later by the Supreme Court of Louisiana, the complaint in the first case apparently being abandoned. While petitioner tried to get the appellate courts to incorporate the record in the first case into the record in the second, that was not done. But that defect has been remedied here, the transcripts of all the hearings now being before the Court.

"A. They tried to take it off, and he was trying to keep the jacket on.

"Q. He held very still?

"A. No, it was a struggle.

"Q. Did he strike out at the officers?

"A. No.

"Q. Did he kick the officers?

"A. I didn't see him. He could have. I didn't see him. It wasn't visible to me."

Later, in answer to a question posed by the court, Martello stated that none of the four officers who removed petitioner's jacket suffered any "marks, bruises, or torn clothing."

On cross-examination Officer O'Rourke testified as follows:

"Q. How was he [petitioner] pushing you around? Did he strike out at someone?

"A. No. Like a football player going through a line.

"Q. Did he try to run?

"A. No, dancing from wall to wall."

Vachal Lindsay, and Carl Sandburg and it was faithfully reflected in our law.

The interest of society in apprehending murderers is obviously strong; yet when the manhunt is on, passions often carry the day. I fear the long and short of it is that an officer's "seizure" of a person on the street, even though not made upon "probable cause," means that if the suspect resists the "seizure," he may then be taken to the police station for further inquisition. That is a terifying spectacle—a person is plucked off the street and whisked to the police station for questioning and identification merely because he resembles the suspected perpetrator of a crime. I fear that with *Terry* and with *Wainwright* we have forsaken the Western tradition and taken a long step toward the oppressive police practices not only of Communist regimes but of modern Iran, "democratic" Formosa, and Franco Spain, with whom we are now even more closely allied.